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COMMENT

AVIATION CHALLENGES ADMIRALTY JURISDICTION: SINK OR SWIM IN THE SEA OF UNCERTAINTY

HISTORICALLY, the common law recognized neither wrongful death nor survival actions.[1] But in 1846, with the passage of Lord Campbell's Act,[2] the English Parliament changed the common law and created a right of action for wrongful death. Similar statutes have been enacted by Congress[3] and by all the states[4] in this country. In the absence of these statutes giving the decedent's representative the right to bring suit, no wrongful death action could be maintained in general maritime law.[5] Therefore, when an air crash causing death occurs in state territorial waters, statutes of the several states, as adopted by maritime law, usually provide a remedy for the decedent's representative.[6] Because of this connection between aviation and admiralty, the purpose of this article is to explore the extent to which maritime law adopts a state's wrongful death statute,[7] or even more important, to decide whether actions arising from such cases should be subject to maritime jurisdiction at all.

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[1] The wrongful death action, which is a suit for pecuniary loss suffered by the decedent's survivors on account of his death is distinguished from a survival action which concerns recovery for personal injuries suffered by the decedent who died before commencing or completing a personal injury action. STUART S. SPEISER, RECOVERY FOR WRONGFUL DEATH, pgs. 1-12, 743-44 (1966). *See* The Harrisburg, 119 U.S. 199 (1886); Insurance Co. v. Brame, 95 U.S. 754 (1877); The Garland, 5 Fed. 924 (E.D. Mich. 1881); Holmes v. O.&C. Ry. Co., 5 Fed. 75 (1880) (action believed to abate with the decedent's death).

[2] 9 & 10 Vict. C. 93 (1846).

[3] Death on the High Seas Act, 41 Stat. 537, 46 U.S.C. § 761 (1964) (death beyond one maritime league from shore); Jones Act, 38 Stat. 1184, 46 U.S.C. § 688 (1964) (death or injury to seamen); Longshoreman's and Harbor Worker's Compensation Act, 44 Stat. 1426, 33 U.S.C. § 903 (1964) (death or injury to employee on navigable waters or dry dock).

[4] The Tungus v. Skovgaard, 358 U.S. 588 (1959).

[5] The Harrisburg, 119 U.S. 199 (1886). *See also*, Hess v. United States, 361 U.S. 314 (1960); Goett v. Union Carbide Corp., 361 U.S. 340 (1960); Butler v. Boston & Savannah Steamship Co., 130 U.S. 527 (1889); United New York Sandy Hook Pilot's Ass'n, 394 F.2d 65 (1968); (Common law did not provide a right of action for wrongful death occurring in state territorial waters).

[6] *E.g.*, Hess v. United States, 361 U.S. 314 (1960); Goett v. Union Carbide Corp., 361 U.S. 340 (1960); Western Fuel Co. v. Garcia, 257 U.S. 233 (1921); Butler v. Boston and Savannah Steamship Co., 130 U.S. 527, 555 (1889); The Harrisburg, 199 U.S. 199 (1886).

[7] *Compare*, Robbins Dry Dock & Repair Co. v. Dahl, 266 U.S. 449 (1925); Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U.S. 479 (1923); Knickerbock Ice Co. v. Stewart, 253 U.S. 149 (1920) and the reasoning in Pope & Talbot, 346 U.S. 406, 409 (1953) *with* Hess v. United States, 361 U.S. 314 (1960); The Tungus v. Skovgaard, 358 U.S. 588 (1959); The H.S., Inc., 130 F.2d 341 (3d Cir. 1942); Thomas v. United Airlines, 290 N.Y.S.2d 753, 30 A.2d 32 (Sup. Ct. N.Y.A.D. 1968).

I. ADMIRALTY JURISDICTION

A. *Scope*

Prior to the adoption of the United States Constitution, constant bickering existed between the common law courts and admiralty judges. This conflict stood as a barrier to every attempted extension of admiralty jurisdiction.[8] Notwithstanding the continual conflict, jurisdiction over admiralty actions was vested exclusively in the federal judiciary by the Constitution,[9] and was extended to all cases of damage and injury that occur upon navigable waters.[10] The common law courts retained some power through the "Savings Clause" of the First Judiciary Act[11] which saved to suitors all other remedies to which they were entitled. Therefore, federal courts sitting in admiralty have exclusive jurisdiction over *in rem* actions,[12] whereas both federal and state courts have concurrent jurisdiction over *in personam* suits of a maritime nature.[13]

Jurisdiction extends to actions sounding in contract or tort;[14] however, the jurisdictional bases of the two are different. In contract actions, maritime jurisdiction depends upon the nature and subject matter of the contract,[15] not upon the place of the agreement.[16] If a contract has sufficient reference to maritime service or maritime transaction, it falls within admiralty jurisdiction.[17] While contracts for repairs,[18] maritime insurance,[19] services of the crew,[20] supplies,[21] carriage of goods or persons,[22] and charters[23] are considered maritime contracts,[24] contracts for sale of vessels[25] or

[8] ANDREWS, THE COLONIAL PERIOD OF AMERICAN HISTORY, Vol. 4, Ch. VIII (Yale Univ. Press 1938). *See* The Favorite, 120 F.2d 899 (2d Cir. 1941).

[9] U.S. Const. art. III, § 2. U.S. Const. art. I, § 8 confers upon Congress the power "to make laws . . . for carrying into execution the foregoing powers. . . ."

[10] 1 Stat. 76 (1789), *as amended*, 28 U.S.C. § 1333 (1964). For definition of navigable waters within the states, *see* The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870); Fretz v. Bull, 53 U.S. (12 How.) 466 (1851); The Steamboat Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825).

[11] 1 Stat. 76 (1789), *as amended*, 28 U.S.C. § 1333 (1964).

[12] *See* Madruga v. Superior Court, 346 U.S. 556, 560 (1954); C.J. Hendry Co. v. Moore, 318 U.S. 133 (1943); Steamboat Co. v. Chase, 83 U.S. (16 Wall.) 522 (1872).

[13] *See e.g.*, Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 124 (1924); Rounds v. Cloverport Foundry and Mach. Co., 237 U.S. 303 (1915); Roth v. Cox, 210 F.2d 76, 79 (5th Cir.), *cert. granted*, 347 U.S. 1009 (1954). For distinction between *in rem* and *in personam* actions, *see*, The China, 74 U.S. (7 Wall.) 53 (1868); Harmer v. Bell, 7 Moore P. C. 267, 13 Eng. Rep. 884 (1852).

[14] *E.g.*, De Lovio v. Boit, 7 Fed. Case 418 (C.C.D. Mass. 1815).

[15] North Pacific S.S. Co. v. Hall Bros. Co., 249 U.S. 119 (1919); New England Mutual Marine Ins. Co. v. Dunham, 78 U.S. (11 Wall.) 1 (1870); The Sirus, 65 Red. 226 (N.D. Calif. 1895).

[16] *E.g.*, New England Mutual Marine Ins. Co. v. Dunham, 78 U.S. (11 Wall.) 1 (1870).

[17] *Id. See also*, Kossick v. United Fruit Co., 365 U.S. 731 (1961); Weinstein v. Eastern Air Lines, 316 F.2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963).

[18] *See e.g.*, North Pacific S.S. Co. v. Hall Bros. Co., 249 U.S. 119 (1919).

[19] New England Mutual Marine Ins. Co. v. Dunham, 78 U.S. (11 Wall.) 1 (1870). *But see*, Wilburn Boat Co. v. Fireman's Ins. Co., 348 U.S. 310 (1955), where the Supreme Court recognized that a marine insurance policy is a maritime contract, but held that "[w]e, like Congress, leave the regulation of marine insurance where it has been—with the States." at 321.

[20] *E.g.*, Sheppard v. Taylor, 30 U.S. (5 Pet.) 675 (1831).

[21] *See* note 18 *supra.*

[22] *E.g.*, The Moses Taylor, 71 U.S. (4 Wall.) 411 (1866); Isbrandtsen Co. v. United States, 233 F.2d 184 (2d Cir.), *cert. denied*, 352 U.S. 842 (1956).

[23] *E.g.*, Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927).

[24] "Mixed contracts" may be litigated under admiralty jurisdiction if they are separable. GILMORE AND BLACK, THE LAW OF ADMIRALTY, 25-26 (1957). *See also*, United Fruit Co. v. United States Shipping Bd. Merchant Fleet Corp., 42 F.2d 222 (D. Mass. 1930).

[25] *E.g.*, Rea v. The Eclipse, 135 U.S. 599, 608 (1889); GILMORE AND BLACK, THE LAW OF ADMIRALTY, 24-25 (1957).

construction of vessels[26] are not.

According to judicial precedent, an injury must occur upon the high seas or navigable waters of a state for a tort action to be cognizable in admiralty, regardless of the relation of the wrongful act to maritime navigation and commerce.[27] The cause of action is deemed to arise, not where the wrongful act or omission has its inception, but where impact of the act or omission produces injury.[28] Contrary to the strong judicial authority, some maritime connection has been urged as an additional requirement to the strict locality test.[29] This argument is based on the theory that, since maritime law is a collection of rules and principles that have been developed over a period of years to meet the unique problems of seamen and the shipping industry,[30] the scope of admiralty jurisdiction should include matters pertaining only to sea commerce.[31] The Supreme Court has failed to rule directly on the question, although in *Atlantic Transport Co. v. Imbrovek*[32] the Court, reasoning that the "locality plus" theory was too narrow, held:

> If more is required than the locality of the wrong in order to give the court jurisdiction, the relation of the wrong to maritime service, to navigation and to commerce on navigable waters, was quite sufficient [in this case].[33]

The majority of cases decided subsequent to *Imbrovek*, where the courts have expressly stated that locality is the sole test, would probably have been similarily decided under the "locality plus" test.[34]

Congress has also used a maritime nexus theory in passage of the Ad-

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[26] *E.g.*, New Bedford Dry Dock Co. v. Purdy, 258 U.S. 96 (1922); The Winnebago, 205 U.S. 354, 363 (1906).

[27] *See* Gutierrez v. Waterman Steamship Corp., 373 U.S. 206, *reh. denied*, 374 U.S. 858 (1963); Kermarec v. Compagnie Generole Transatlantique, 358 U.S. 625, 628 (1959); The Plymouth, 70 U.S. 20 (1865); Weinstein v. Eastern Air Lines, 316 F.2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963); Strika v. Netherlands Ministry of Traffic, 185 F.2d 555 (2d Cir.), *cert. denied*, 341 U.S. 904 (1951); King v. Testerman, 214 F. Supp. 335 (E.D. Tenn. 1963); Wilson v. Transocean Airlines, 121 F. Supp. 85 (N.D. Cal. 1954); The City of Lincoln, 25 Fed. 835 (S.D.N.Y. 1885). *See* Comment, 64 COLUM. L. REV. 1084, 1088 (1964).

[28] *Id.*

[29] *See* McGuire v. City of New York, 192 F. Supp. 866 (S.D.N.Y. 1961). *McGuire* involved a libel in admiralty for personal injuries sustained by a swimmer at a public beach when she struck a submerged piling. In dismissing the libel for lack of admiralty jurisdiction, the court held:

> While it has been urged that admiralty has jurisdiction over all torts where the wrong takes place on the high seas or other public navigable waters, this position has not been adopted either by the text writers or by the courts. The basis for admiralty jurisdiction must be a combination of a maritime wrong and a maritime location. A maritime wrong generally has been concluded to be one which in some way is involved with shipping or commerce. 192 F. Supp. at 868.
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> The libellant seeks to use the holding in the Plymouth [70 U.S. 20 (1865)] and the other locality cases to support her contention that any tort occurring on navigable waters is a maritime tort. . . . She seeks, thereby to use the locality test as a means of argument is taken out of context. *The test was developed as a rule of limitation, as a means of limiting the scope of admiralty jurisdiction* [Emphasis added.]. 192 F. Supp. at 869.

See also, Minne v. Port Huron Co., 295 U.S. 647 (1935); Cambell v. H. Hackfield & Co., 125 Fed. 696 (9th Cir. 1903); Smith v. Guerrant, 290 F. Supp. 111 (S.D. Tex. 1968). Brown, *Jurisdiction of the Admiralty in Case of Tort*, 9 COLUM. L. REV. 1 (1909).

[30] Black, *Admiralty Jurisdiction—Critique and Suggestion*, 50 COLUM. L. REV. 259 (1950).

[31] *See* notes 29-30 *supra.*

[32] 234 U.S. 52 (1914).

[33] *Id.* at 62.

[34] See cases listed in note 27 *supra. See also*, Comment, 64 COLUM. L. REV. 1084, 1088 (1964).

miralty Extension Act.[35] This act extends admiralty jurisdiction to cases formerly dismissed under the strict locality test.[36] Moreover, a special standard is applied to seamen under the Jones Act.[37] Jurisdiction depends on the status of the claimant, not the locality of the injury.[38] He must be a member of the crew of the vessel and injured in the course of employment.[39] Thus, jurisdiction is upheld even though the situs of the act or omission is not upon navigable waters.[40]

B. *Aviation And Extension Of Admiralty Jurisdiction*

Notwithstanding the application of certain rules of navigation to seaplanes afloat on navigable waters[41] and provisions of the United States Criminal Code pertaining to vessels at sea,[42] Congress has treated aviation as something separate and distinct from maritime matters.[43] Courts have followed a similar policy by refusing to allow: Creditors the right to assert maritime liens against aircraft;[44] limited liability in admiralty to aircraft owners involved in fatal crashes at sea;[45] and members of a plane's crew to bring an action under the Jones Act.[46]

Although Congress and the courts have distinguished aviation from

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[35] 62 Stat. 496 (1948), 46 U.S.C. § 740 (1964). The act circumvents the strict locality test by extending jurisdiction to injuries or damages caused by a vessel or some accessory to it. *See e.g.*, United States v. Matson Navigation Co., 201 F.2d 610 (9th Cir. 1953); *also*, Gutierrez v. Waterman Steamship Corp., 373 U.S. 206 (1963).

[36] *See e.g.*, The Plymouth, 70 U.S. 20 (1866).

[37] 38 Stat. 1184, 46 U.S.C. § 688 (1964). Although seamen are foreclosed from bringing an action *in rem* pursuant to the Jones Act [Plamale v. The Pinar Del Rio, 277 U.S. 151 (1928)], they enjoy a privileged position under maritime law. This privilege stems from the fact that an injured seaman or his representative in case of death has the right to sue his employer in an action at law for damages. Moreover, by judicial interpretation he may also assert the statute in admiralty. [Panama R.R. v. Johnson, 264 U.S. 375 (1923)].

[38] Swanson v. Marra Bros., Inc., 328 U.S. 1, 4 (1946); O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 42-43 (1943).

[39] *Id.*; Hagans v. Ellerman & Bucknall S.S. Co., 318 F.2d 563 (3d Cir. 1963). *See also*, Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963); Warren v. U.S., 340 U.S. 523, 529 (1950); Braeu v. Pfeifer Oil Trans. Co., 361 U.S. 129 (1959); Marceau v. Great Lakes Transit Corp., 146 F.2d 416 (1944). *See* Comment, 64 COLUM. L. REV. 1084, 1088 (1964).

[40] O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943); Hagans v. Ellerman & Buchnall S.S. Co., 318 F.2d 563 (3d Cir. 1963).

[41] "Regulations for prevention of Collisions at Sea" must be followed by seaplanes afloat in navigable waters. 65 Stat. 406, 33 U.S.C. § 143 (1964). Lambros Seaplane Base v. The Botary, 215 F.2d 228 (2d Cir. 1954) (Seaplanes are subject to admiralty jurisdiction while afloat on navigable waters).

[42] An airplane, while flying over the high seas has been held not within maritime jurisdiction. United States v. Cordova, 89 F. Supp. 298 (E.D.N.Y. 1950). However, the Code was amended to include airways above the high seas. 66 Stat. 589, 18 U.S.C. § 7(5) (1964). Moreover, the word "vessels" as used in a federal statute punishing stowaways was held not to include aircraft. United States v. Peoples, 50 F. Supp. 462 (N.D. Cal. 1943). *But see*, 58 Stat. 111 (1944), 18 U.S.C. § 2199 (1964), where this statute was amended to include aircraft.

[43] "Except as specifically provided in sections 143-147d of Title 33 [now repealed], the navigation and shipping laws of the United States, including any definition of 'vessel' or 'vehicle' found therein and including the rules for the prevention of collisions, shall not be construed to apply to seaplanes or other aircraft or to the navigation of vessels in relation to seaplanes or other aircraft." 75 Stat. 527 (1964), 49 U.S.C. § 1509(a) (1964).

[44] United States v. Northwest Air Service, 80 F.2d 804 (9th Cir. 1935); Crawford Bros. No. 2, 215 Fed. 269 (D. Wash. 1914); United States v. One Waco Bi-Plane, 1933 U.S. Av. Rep. 159 (D. Ariz. 1932) (not officially cited).

[45] Noakes v. Imperial Airways, 29 F. Supp. 412 (S.D.N.Y. 1939); Dallins v. Pan American Grace Airways, 27 F. Supp. 487 (S.D.N.Y. 1939).

[46] Stickrod v. Pan American Airways Co., 1941 U.S. Av. Rep. 69 (S.D.N.Y. 1941). *See also*, note 37 *supra* (seaman's privileged position).

maritime matters in many instances,[47] wrongful deaths arising from plane crashes on the high seas have been held cognizable in admiralty under the Death on the High Seas Act (DHSA).[48] The DHSA merely creates a cause of action inuring to the exclusive benefit of the decedent's survivors.[49] Since the passage of the Act does not appear to expand the geographical limits of admiralty jurisdiction,[50] application of the Act must be based on the rule that the impact of the act occurred on the high seas.[51] However, in *D'Aleman v. Pan American World Airlines*,[52] involving a claim for wrongful death allegedly caused by decedent's fear at seeing one of the plane's engines feathered while over the high seas, the court deduced that the DHSA is applicable to a tort committed in the airways.[53] In so reasoning, the court held:

> The Act [DHSA] was designed to create a cause of action in an area not therefore under jurisdiction of any court. The means of transportation into the area is of no importance. The statutory expression 'on the high seas' should be capable of expansion to, under, or over, as scientific advances change the methods of travel.[54]

Through analysis of the *D'Aleman* case, the court, in *Notarian v. Trans World Airlines, Inc.*,[55] allowed recovery for non-fatal personal injuries sustained in the airways above the high seas. Reasoning that the one who owns the surface owns the airspace over it, the court held:

> [C]ontact either with the land or with the water over which the plane is flying is not a jurisdictional requisite for the bringing of an action where remedies are otherwise provided. . . .[56]

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[47] Notes 43-46, *supra*.

[48] 41 Stat. 537, 46 U.S.C. §§ 761-67 (1964). *See e.g.*, Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957); Higa v. Transocean Airlines, 124 F. Supp. 13 (D. Hawaii 1954), *aff'd*, 230 F.2d 780 (9th Cir. 1955), *cert. dismissed*, 352 U.S. 802 (1956); Choy v. Pan American Airways Co., 19 Am. Mar. Cas. 483 (S.D.N.Y. 1941).

[49] 41 Stat. 537, 46 U.S.C. §§ 761-67 (1964). The Act creates a cause of action in the decedent's representative for death on the high seas beyond one maritime league from shore.

[50] In Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir. 1957), the court dismissed an action at law under the DHSA on grounds that it was cognizable only in admiralty. On appeal, the court reasoned that since the DHSA was cognizable in admiralty, it would not rule on "whether the Death on the High Seas Act grants a right of action for death in the air space." 247 F.2d at 680. Moreover, in Choy v. Pan American Airways, 19 Am. Mar. Cas. 483 (S.D.N.Y. 1941), the court held that the DHSA was not a navigation and shipping law within the meaning of the Air Commerce Act [now, 75 Stat. 527 (1964), 49 U.S.C. § 1509(a) (1964)], but the court did not deny that the airways were free from admiralty jurisdiction. *See* Note 25 J. AIR L. & COM. 102, 104 (1958).

[51] *See* Lavello v. Danko, 175 F. Supp. 92 (S.D.N.Y. 1959); Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957). *See* Note, 25 J. AIR L. & COM. 102, 104 (1958).

[52] 259 F.2d 493 (2d Cir. 1958). *See also*, Wilson v. Transocean Airlines, 121 F. Supp. 85 (N.D. Cal. 1954), where the court held that "the question whether the airspace over the seas is within the jurisdiction of admiralty has received little attention and remains an open one. . . ." at 91-92. In Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir. 1957), the court did not express an opinion on whether the DHSA grants a right of action in admiralty for death caused in the air space above the seas. The court contended that this "problem raises grave constitutional questions as to the permissible scope of admiralty jurisdiction." 247 F.2d at 680.

[53] 259 F.2d at 496.

[54] *Id.* at 495-96.

[55] 244 F. Supp. 874 (W.D. Pa. 1965). The case concerned a claim for compensation for injuries caused by a jolt during a flight across the ocean.

[56] *Id.* at 877.

Although the analogy is weak, the case is still good authority for expansion of admiralty into airspace.[57]

Weinstein v. Eastern Air Lines[58] (concerning a state death statute) is a recent example pointing out the results of subjecting an aviation case, unrelated to the maritime industry, to a court whose asserted interest lies in enforcement of federal regulation of sea commerce.[59] In *Weinstein*, the decedent's representative asserted claims involving a maritime tort, breach of contract and breach of warranty arising from a plane crash in Massachusetts waters. The plane was en route from Boston's Logan Airport to points west. Sitting in admiralty, the court held that the strict locality test is the majority standard in admiralty-tort cases; thus, the tort claim is cognizable in admiralty. Striking down the contract and warranty claims, the court held:

> [A] contract or warranty relating to the airframe or power plant of a land-based aircraft and a contract of carriage by air between two cities on the United States mainland are not maritime in substance, nor are . . . [they] made maritime by virtue of the fact that the aircraft . . . flew briefly over navigable waters [of a state]. . . .[60]

C. *Conclusion*

Despite the weight of authority professing that strict locality is the sole requirement for tort actions arising from an injury or death at sea or on state navigable waters, the more persuasive reasoning is that such a mechanical test is not in reality the sole requirement. Congress and the courts have shown that they are reluctant to subject aviation to maritime rules in many areas.[61] In extending jurisdiction to injuries caused by an offending "vessel," Congress effectively circumvented the strict locality rule.[62] Moreover, the courts have constructed the intent of Congress, in passage of the Jones Act, as requiring a maritime connection to injuries of seamen.[63] Even the cases in which the strict locality test has been espoused, would probably have been upheld under the "locality plus" test; thus, it can be assumed that a maritime connection has been a silent factor in asserting admiralty jurisdiction.[64] Since the cases in which the courts have held that the airspace is within admiralty jurisdiction involved transoceanic flight, they, too, could have met the maritime nexus test—commerce across the sea.[65]

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[57] Moore & Pelaez, *Admiralty Jurisdiction—The Sky's the Limit*, 33 J. AIR L. & COM. 3, 26-27 (1967).

[58] 316 F.2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963).

[59] *See generally*, Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 381 (1918); Southern Pacific Co. v. Jensen, 244 U.S. 205, 215 (1917).

[60] 316 F.2d at 766. However, *see* Montgomery v. Goodyear Tire & Rubber Co., 231 F. Supp. 447 (S.D.N.Y. 1964), where the court held that an action for breach of warranty of fitness and merchantability of a naval dirigible was cognizable in admiralty. It reasoned that, since the dirigible was intended for use over navigable waters, "it was more likely than not that a crash would take place over water, and so within admiralty jurisdiction." 231 F. Supp. at 454.

[61] Notes 43-47 *supra.*

[62] Notes 35-36 *supra.*

[63] Notes 37-40 *supra.*

[64] Notes 27 & 34 *supra. See also*, Comment, 64 COLUM. L. REV. 1084, 1091 (1964).

[65] Notarian v. Trans World Airlines, Inc., 244 F. Supp. 874 (W.D. Pa. 1965); D'Aleman v. Pan American World Airlines, 259 F.2d 493 (2d Cir. 1958).

If the *res* had been a "vessel" instead of an airplane in *Weinstein* (assuming the plane was not destroyed), the decedent's representative could have brought a suit *in rem*. In the same context, the plane's owner was without the benefit of limited liability afforded a "vessel's" owner. There seems to be an anomaly in extending admiralty jurisdiction into the airspace while allowing the maritime law to give preferential treatment only to those connected with the maritime industry. In converse, the "locality plus" rule appears more theoretically sound when dealing with a non-maritime industry. Nevertheless, the trend in recent plane crash litigation is adherence to the mechanical-locality test professed to be developed under a body of law, the purpose of which is the regulation of commerce on the sea.

II. Filling the "Void" in Maritime Law

A. *Early Development*

As early as 1881, a federal court allowed a father to recover in an action *in rem* for the death of his son caused by a collision on the Detroit River.[66] The court held that the action was cognizable in admiralty when brought pursuant to a state's wrongful death statute. Within five years, the Supreme Court, in *The Harrisburg*,[67] reiterating that no wrongful death action existed in maritime law for death occasioned in state navigable waters,[68] held that admiralty could adopt a state's death action on such occasion. Although this statement was merely dictum—running of the statute of limitations barred recovery—most later cases, relying primarily on the dictum, have unanimously held that admiralty can fashion its own law[69] by adopting the wrongful death statutes of the states to supplant maritime law.[70] Moreover, when deaths occurred on the high seas because of a wrongful act, admiralty again drew on state death statutes to provide a right of action and remedy for maritime law.[71] If the ship was American, admiralty courts employed the law of the state of incorporation, relying on the theory that the vessel was an extension of the state's territory.[72]

However, in many instances, state wrongful death statutes did not

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[66] The Garland, 5 Fed. 924 (E.D. Mich. 1881). *See also*, Sherlock v. Alling, 93 U.S. 99 (1876); Steamboat Co. v. Chase, 83 U.S. (16 Wall.) 522 (1872) (By virtue of the "savings clause" state courts were allowed to entertain actions under their death statutes for deaths occurring in their waters.).

[67] 119 U.S. 199 (1886).

[68] *Id.* at 213. *See generally*, cases in note 5 *supra*.

[69] *See* Kermarec v. Compagine Generale, 358 U.S. 625 (1959); Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) (If Congress has not set-up statutory guidance, maritime law, as formed by the federal courts, is the applicable law in maritime matters). *See also*, Clearfield Trust Co. v. U.S., 318 U.S. 363 (1943); D'oench, Duhme, & Co., Inc. v. Fed. Deposit Ins. Corp., 315 U.S. 447 (1942) (If there is no Congressional ruling or judicial precedent on a federal question, a federal court can fashion its own rule).

[70] *E.g.*, Hess v. United States, 361 U.S. 314 (1960); Western Fuel Co. v. Garcia, 257 U.S. 233 (1921).

[71] The Hamilton, 207 U.S. 398 (1907); The E. B. Ward, Jr., 17 Fed. 456 (C.C.E.D. La. 1883).

[72] *E.g.*, The Hamilton, 207 U.S. 398 (1907) (death on the high seas); Thompson Towing & Wrecking Ass'n v. McGregor, 207 F. 209 (6th Cir. 1913) (death on Lake Huron); Patton-Tully Transportation Co. v. Turner, 269 F. 334 (6th Cir. 1920) (death on Mississippi River).

provide a remedy for death on the high seas.[73] Because of the failure to furnish a remedy in many instances and the fact that the Supreme Court, in 1917, had enunciated the concept of a uniform maritime law as the only source of rights and liabilities in maritime actions,[74] Congress was motivated to pass the DHSA.[75] Since the enactment of the DHSA, cases are unanimous in ruling that state death statutes are superseded in every situation where the DHSA is applicable.[76] This Act, however, does not preclude a remedy under a state survival statute.[77] On the other hand, courts have refused to interpret it as allowing actions brought pursuant to state death statutes to be preserved by the "Savings Clause."[78]

B. *Conflict Between Federal And State Law*

Relying on court interpretation of the DHSA, admiralty courts have limited the use of state death statutes to wrongful deaths occurring in their respective territorial waters. Thus, the issue arises as to what extent admiralty adopts the state statute in order to fill the "void"[79] in maritime law. Not until *Southern Pacific Co. v. Jensen*[80] did the Supreme Court really speak out on the issue. In *Jensen*, the decedent's representative brought an action in a New York court pursuant to the New York Workmen's Compensation Act. While working as a stevedore unloading a ship, the decedent received fatal injuries. The Court, relying on the rationale of supremacy and uniformity enunciated continuously by the Court in cases arising under Congress' power over interstate commerce,[81] held the

[73] *E.g.*, The Middlesex, 253 F. 142 (D. Mass. 1916); The Robert Graham Dun, 70 F. 270 (1st Cir. 1895).

[74] *See* Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); Chelentis v. Luckenbach S.S., 247 U.S. 372 (1918); Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917). For later cases enunciating uniformity, *see* Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); Washington v. Dawson & Co., 264 U.S. 219 (1924); Robbins Dry Dock & Repair Co. v. Dahl, 266 U.S. 449 (1925). *See also*, Dodds, *The New Doctrine of the Supremacy of Admiralty over the Common Law*, 21 COLUM. L. REV. 647 (1921).

[75] 41 Stat. 537 (1920), 46 U.S.C. 761-67 (1964). *See generally*, S. REP. No. 216, 66th Cong. 1st Sess. (1919); H. R. REP. No. 674, 66th Cong. 2d Sess. (1920).

[76] *E.g.*, Middleton v. Luckenbach S.S. Co., 70 F.2d 326 (2d Cir.), *cert. denied*, 293 U.S. 577 (1934); Batkiewicz v. Seas Shipping Co., 53 F. Supp. 802 (S.D.N.Y. 1943); Choy v. Pan American Airways Co., 1941 Am. Mar. Cas. 483 (S.D.N.Y.); *contra.*, Higa v. Transocean Airlines, 230 F.2d 780, 783 (9th Cir. 1955), *cert. dismissed*, 352 U.S. 802 (1956).

However, a "seaman's" representative can elect to bring suit under the Jones Act or the DHSA. Doyle v. Albatross Tanker Corp., 260 F. Supp. 303 (1965), *aff'm*, 367 F.2d 465 (1965); Gvirtsman v. Western King Co., 263 F. Supp. 633 (D.C. Cal. 1967).

[77] Petition of Gulf Oil Corp., 172 F. Supp. 911 (S.D.N.Y. 1959); United States v. The S.S. Washington, 172 F. Supp. 905 (E.D. Va.), *aff'm*, 272 F.2d 711 (4th Cir. 1959). *See* Comment, 64 COLUM. L. REV. 1084 (1964).

[78] *See* Trikey v. Transocean Air Lines, Inc., 255 F.2d 824 (9th Cir. 1958); Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir. 1957); Kunkel v. U.S., 140 F. Supp. 591 (S.D. Cal. 1956); Wilson v. Transocean Airlines, 121 F. Supp. 85 (N.D. Cal. 1954); Ifrate v. Compagnie Generale Transalantique, 106 F. Supp. 619 (S.D.N.Y. 1952); Egen v. Donaldson Atlantic Line, 37 F. Supp. 909 (S.D.N.Y. 1941); Burkes v. United Fruit Co., 48 F.2d 656 (S.D.N.Y. 1930). *See also*, debates in the House of Representatives in 59 Cong. Rec. 4482-87 (1920) for an amendment proposed and passed with the purpose of leaving any right a claimant had under the state laws, not to be excluded by passage of the DHSA. *See* Comment, 51 CAL. L. REV. 389, 397 (1963) (Not sure if the DHSA may be brought for death occurring within waters of a foreign country).

[79] *E.g.*, Western Fuel Co. v. Garcia, 257 U.S. 233 (1921).

[80] 244 U.S. 205 (1917). *Also see* cases in note 74 *supra* for uniformity argument. *But see*, The Harrisburg, 119 U.S. 199 (1886) (dictum).

[81] *E.g.*, Vance v. Vance, 170 U.S. 438 (1897); Clark Distilling Co. v. Western Ma. Ry. Co., 242 U.S. 311 (1916).

New York act void on grounds that it was in conflict with the constitutional grant of maritime power in the federal judiciary. Supporting its reasoning, the Court held:

> In view of the constitutional provisions [Art. III sec. 2 & Art. I sec. 8] and the federal act it would be difficult, if not impossible, to define with exactness just how far the *general maritime law may be changed, modified, or affected by state legislation.* That *this may be done to some extent* cannot be denied. . . . Equally well established is the rule that *state statutes may not contravene* an applicable *act of Congress or affect the general maritime law beyond certain limits.* . . . [N]o such [state] legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations [Emphasis added.].[82]

Courts have construed application of state wrongful death statutes as within the *extent* of allowable modification mentioned in *Jensen.*[83] Moreover, further construction of *Jensen* induced a two-fold guide: If the action is rooted in general maritime law, *i.e.*, a personal injury action,[84] general maritime law must be used to determine the outcome of the suit;[85] but, if the action is rooted in state law,[86] *i.e.*, actions for wrongful death occurring in state waters,[87] state substantive law must be applied[88] where the state law is not in conflict with a right created by maritime law.[89] Application of the test appears simple, and is, if the action encompasses maritime injuries—the action is subject to maritime principles.[90] However, trouble ensues when admiralty courts, entertaining an action for wrongful death, are confronted with the issue of whether to apply the standard of care and contributory negligence of maritime law or those based in state law. Seaworthiness, the maritime standard of care, creates an absolute duty on the ship owner to furnish a seaworthy ship. This concept creates a higher duty than the common law standard of due care in negligence actions.[91] Moreover, a person may be barred from recovery for

[82] 244 U.S. at 216.

[83] *E.g.*, The Tungus v. Skovgaard, 358 U.S. 588 (1959); Western Fuel Co. v. Garcia, 257 U.S. 233 (1921).

[84] Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953); Byrd v. Napolean Ave. Ferry Co., 125 F. Supp. 573 (S.D. La. 1954), *aff'd*, 227 F.2d 958 (5th Cir.), *cert. denied*, 351 U.S. 925 (1956); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

[85] *See generally*, Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959); Pope & Talbot v. Hawn, 346 U.S. 406 (1953); Garrett v. Moore-McCormick, 317 U.S. 239 (1942); Washington v. Dawson & Co., 264 U.S. 219 (1924); Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918). *But see*, Caldarola v. Echert, 332 U.S. 155 (1947).

[86] Garrett v. Moore-McCormick, 317 U.S. 239 (1942). The court held that "admiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State." 317 U.S. at 245. *See also*, Wilburn Boat Co. v. Fireman's Ins. Co., 201 F.2d 833, 837 (5th Cir. 1953); Justice v. Chambers, 312 U.S. 383 (1941). *See* Comment, 64 COLUM. L. REV. 1084, 1095 (1964).

[87] *E.g.*, The Tungus v. Skovgaard, 358 U.S. 588 (1959); Hess v. United States, 361 U.S. 314 (1960).

[88] Notes 86 & 87 *supra. But see*, Pope & Talbot v. Hawn, 346 U.S. at 409 where the Court reasoned that the state created standard must be governed by maritime law (dictum).

[89] Garrett v. Moore-McCormick Co., 317 U.S. 239 (1942); Kenney v. Trinidad Corp., 349 F.2d 832 (5th Cir.), *cert. denied*, 382 U.S. 1030 (1966); *accord*, Hess v. United States, 361 U.S. 314, 320 (1960).

[90] Notes 84-85 *supra* and accompanying text.

[91] Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960); Mahnick v. Southern S.S. Co., 321 U.S. 96 (1944).

contributory negligence under most state substantive law, whereas maritime law operates under the rule of comparative negligence.[92] Thus, maritime law offers more liberal grounds for relief to a claimant.

Because of the possible variance in outcome of an action that is subject to a state's standard of care and contributory negligence and, also, the notion that uniformity and supremacy in maritime law is paramount,[93] courts in the past took the position that employment of a state's death statute was merely remedial.[94] Therefore, state substantive law should yield to general maritime law.[95] In sum, a claimant bringing suit under a state's death statute, like one bringing an action for personal injury, would have the benefit of the maritime standard of care and comparative negligence. However, distinguishing between actions for injury and those for death, recent courts have rationalized that, since maritime law failed to provide a cause of action for death in state waters, the right of action is grounded in state law. This being the case, the full substantive law of the state must be enforced.[96] The confusion between the conflicting views was finally adjudicated by the Supreme Court in *The Tungus v. Skovgaard*.[97] While unloading oil from a vessel, the decedent received fatal injuries. His widow, alleging unseaworthiness of the vessel and negligent failure to provide a safe place to work, brought suit in admiralty. Deciding that the district court had erred[98] in dismissing the suit,[99] the appellate court held that New Jersey's wrongful death statute encompassed an action for death caused by an unseaworthy vessel. Certiorari having been granted, the respondent contended that, if the Court did not adhere to the appellate court's decision, the full corpus of maritime law—"free from any qualifications imposed by the State"[100]—could be applied where the state had enacted some sort of death statute. Rejecting this contention and relying on the dictum in *The Harrisburg*,[101] the Court reasoned that "when admiralty adopts a State's right of action for wrongful death, it must enforce the

[92] *See* Pope & Talbot v. Hawn, 346 U.S. 406 (1953) (contributory negligence just mitigates damages under general maritime law).

[93] See cases cited in note 74 *supra*.

[94] *See generally*, Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U.S. 479 (1923); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); The Devona, 1 F.2d 482 (D. Me. 1924); Riley v. Agwilines, Inc., 296 N.Y. 402, 405-06, 73 N.E.2d 718, 719 (1947); and reasoning in Pope & Talbot, 346 U.S. at 409 (dictum).

[95] *Id.*

[96] *See* Levinson v. Deupree, 345 U.S. 648 (1953); Western Fuel Co. v. Garcia, 257 U.S. 233 (1921); La Bourgone, 210 U.S. 95 (1908); The Hamilton, 207 U.S. 398 (1907); Curtis v. A. Garcia Y. Cia, 241 F.2d 30 (3d Cir. 1957); Byrd v. Napoleon Ave. Ferry Co., 125 F. Supp. 573 (E.D. La. 1954), *aff'd*, 227 F.2d 958 (5th Cir. 1955), *cert. denied*, 351 U.S. 925 (1956); The H.S., Inc., 130 F.2d 341 (3d Cir. 1942); The Benny Shou, 200 F.2d 246 (4th Cir. 1942). *But see*, O'Leary v. U.S. Lines Co., 215 F.2d 708 (1st Cir. 1954). The decision created confusion by reasoning that a wrongful death action under a state's death statute for a tort committed in state waters was to be determined by substantive general maritime law. The court relied on Pope & Talbot v. Hawn, 346 U.S. 406 (1953), which concerned an action for personal injury not wrongful death.

[97] 358 U.S. 588 (1959).

[98] 252 F.2d 14 (3d Cir. 1957).

[99] 141 F. Supp. 653 (D. N.J. 1956).

[100] 358 U.S. at 592.

[101] "[I]f the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitation which have been made a part of its existence . . . . The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right." 119 U.S. at 214.

right as an integrated whole, with whatever conditions and limitations the creating State has attached."[102] In support of its deduction, the Court relied on the legislative history of the DHSA and held that the intent of Congress was to leave the rights under the state death statutes "unimpaired."[103] Therefore, the Court held that the New Jersey statute could encompass an action based on unseaworthiness and that it would not overrule the appellate court's interpretation of New Jersey law. Failing to distinguish between a "right" of action for wrongful death and "duty" of care, four dissenters fervently argued that the death statute should be used only as a remedy in enforcing a federally based duty.[104] They supported their argument by referring to cases reiterating the uniformity rule[105] and the dictum in *Pope & Talbot v. Hawn*,[106] concerning recovery for *injuries* caused by a maritime tort. Nevertheless, the dissenters did reveal the "anomalous" result that arises when different bodies of law, which are dependent on whether the claimant is injured or killed, govern the result of tortious conduct.[107]

Less than a year after *The Tungus* decision, the Supreme Court entertained a case concerning application of a state's substantive law that required a higher standard than maritime law. In *Hess v. United States*,[108] the decedent's representative brought suit pursuant to Oregon's Employers Liability Statute, which imposed a higher standard of care than that imposed by maritime law.[109] Adhering to the reasoning in *The Tungus* that a court "may not pick or choose"[110] when enforcing a right based in state law,[111] the Court held that a right of action for wrongful death created by the state's statute could be enforced for a maritime death occurring in state waters without constitutional impediment.[112] However, the Court did recognize that a state's wrongful death statute might contain provisions so offensive to general maritime law that admiralty courts would refuse to enforce it.[113] Four of the judges concurred in the result "solely under compulsion of the Court's ruling in *The Tungus*,"[114] but reserved

[102] 358 U.S. at 592. "Even Southern Pacific Co. v. Jensen, which fathered the 'uniformity' concept, recognized that uniformity is not offended by 'the right given to recover in death cases.'" 244 U.S. 205 at page 216, ... It would be an anomaly to hold that a State may create a right of action for death, but that it may not determine the circumstances under which the right exists." 358 U.S. 594.

[103] *Id.* at 593. *See also*, 59 CONG. REC. 4482-87 (1920); S. 2085, 66th Cong., 2d Sess. § 7 (1920) (legislative history of the DHSA). *See* dissent rejecting this argument, 358 U.S. at 607-09.

[104] 358 U.S. at 605.

[105] *Id.* at 608. *See also*, cases cited in note 74 *supra*.

[106] *Id.* at 598. Pope & Talbot v. Hawn, 346 U.S. 406, 409-10 (1953) (dictum).

[107] 358 U.S. at 609. *See* Byrd v. Napolean Ave. Ferry Co., 125 F. Supp. 573 (S.D. La. 1954), *aff'd*, 227 F.2d 958 (5th Cir. 1953), *cert. denied*, 351 U.S. 925 (1956). In this case a car plunged into the Mississippi River. The decedent's wife brought suit for her husband's death, but was barred from recovery because of her husband's contributory negligence. However, she was allowed to recover under general maritime law that uses the comparative negligence standard. 351 U.S. at 579.

[108] 361 U.S. 314 (1960).

[109] Under general maritime law the standard of care in this situation would be reasonable care—negligence. *See e.g.*, Kermarec v. Compagnie Generale, 358 U.S. 625 (1959).

[110] 358 U.S. at 593.

[111] 361 U.S. at 320.

[112] *Id.* at 321.

[113] *Id.* at 320.

[114] *Id.* at 321.

their position in case it was ever overruled. Grasping at the majority's statement that a state law could be too offensive for enforcement in admiralty courts, two dissenters reasoned as follows: Where a duty imposed by a state is no greater than that existing under federal law, there is no encroachment on federal interests; but, where the duty is greater, the state is seeking to regulate conduct within maritime jurisdiction.[115]

C. *Aviation Challenges Choice Of Law*

1. *Aviation.*

If a suit is pursued in federal court on diversity jurisdiction, the court is bound by the rules of *Erie R.R. Co. v. Thompkins*[116] and *Klaxon v. Stentor Elec. Mfg. Co., Inc.*[117] Accordingly, an action brought pursuant to the "Savings Clause" must be adjudicated under the substantive law of the state in which the federal court sits. Considering the choice of law rule paramount, the Court in *Klaxon* held that state choice of law rules must be followed in diversity cases.[118] However, under general maritime law, admiralty courts are not bound by the law of the state in which they sit.[119] Since a maritime action is "[s]ubject to the dominant control of the Federal Government," it is immaterial whether admiralty or diversity is relied upon when the action involves a maritime tort.[120] Thus, when the court entertains a personal injury action arising under general maritime law, admiralty enforces its own choice of law rule.[121] In spite of some decisions not directly on point,[122] the issue of whether, in an action for wrongful death occurring in state waters, an admiralty court must follow federal conflict of laws or the law of the forum had never been litigated. Without espousing which choice of law rule was being enforced, admiralty courts had applied the law of the place of death (*lex loci delicti*)

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[115] *Id.* at 328-34.

[116] 304 U.S. 67, 74-77 (1938). *See also,* Guaranty Trust Co. v. York, 326 U.S. 99, 108, *reh. denied,* 326 U.S. 806 (1945).

[117] 313 U.S. 487, 496-97 (1944). *See also,* 105 U. PA. L. REV. 797 n.36 (1957).

[118] *Id.* The Court held "that the prohibition declared in *Erie* . . . against such independent determinations by the federal courts, extends to the field of conflict of laws." 313 U.S. at 496.

[119] Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 410-11 (1953) especially n.4 and cases cited therein.

[120] *Id.* at 410-11. *See also,* Massaro v. United States Lines Co., 307 F.2d 299 (3d Cir. 1962); J. B. Efferson Co. v. Three Bays Corp., 238 F.2d 611 (5th Cir. 1956). A State court must also enforce federal maritime law when adjudicating an action for wrongful death occurring in state waters. Carlise Packing Co. v. Sandanges, 259 U.S. 255 (1922).

Prior to Southern Pacific v. Jensen, 244 U.S. 205 (1917), the choice of forum had substantive as well as procedual effect because courts reasoned that the common law and maritime law were separate systems each supreme in its own forum. *See* Beldon v. Chase, 150 U.S. 674 (1893) (admiralty action is state court); The Max Morris, 137 U.S. 1 (1890) (admiralty action); Quebec S.S. Co. v. Merchant, 133 U.S. 375 (1890) (admiralty action on law side of federal court).

[121] Siegelman v. Cunard White Star, Ltd., 221 F.2d 189, 193 (2d Cir. 1955); Jansson v. Swedish-American Line, 185 F.2d 212 (1st Cir. 1950); Ficke v. Isbrandsten Co., 151 F. Supp. 465 (S.D.N.Y. 1957).

[122] Levinson v. Deupree, 345 U.S. 641 (1953) (The Court, entertaining an action for wrongful death occurring in state waters, held that admiralty is not bound by procedural niceties of state law. Rejecting the state's rule on amendment of pleadings, the Court left open the question on whether federal choice of law rules might be applied in deciding which state statute should be enforced); Siegelman v. Cunard White Star, Ltd., 221 F.2d 189 (2d Cir. 155) (Entertaining a maritime personal injury action, the court reasoned that, unless a state's rule limited the right under state law, an admiralty court might not be bound by the state's choice of law rule) (dictum).

in every case.[123] Until 1963, this was the choice of law rule in every state.[124] Since then, several states have abandoned the *lex loci delicti* rule in favor of the "significant contacts" rule.[125] This change in state law has given rise to an interesting line of cases professing that the choice of law of the forum was applicable in an action for wrongful death arising from fatal injuries in state waters.

To give background to this line of cases, the *Scott v. Eastern Air Lines* (first hearing)[126] decision must be mentioned first. Bringing a death action arising from the same crash as *Weinstein*, the administrator sought relief for a negligent breach of contract of carriage under the "Savings Clause." The action was grounded on diversity jurisdiction. The district court held that Pennsylvania law (significant contacts doctrine), the law of the forum, controlled the question of recoverable damages.[127] The appellate court failed to recognize that the action was really a diversity action, saved to the suitor by the First Judiciary Act,[128] instead of an action for a maritime tort. Reversing the lower court's decision, it held:

> [M]aritime law will accord dependents and survivors rights of recovery neither more or less extensive than they would enjoy under the law of the state within whose territorial waters the fatal maritime tort occurred.[129]

In sum, replying primarily on *The Tungus* and *Hess* decisions, the court reasoned that the choice of law issue is not governed by the law of the forum. On rehearing *en banc*, the court not only reversed its first position and affirmed the lower court's decision, but completely reversed itself as to the conflict of laws rule followed in admiralty cases.[130] Six months later, but before the rehearing in *Scott, Thomas v. United Airlines*,[131] arising from a fatal injury suffered in a plane crash in Illinois territorial waters, came before the New York Supreme Court. Alleging a maritime tort, the decedent's representative sought relief under New York law which did not limit recoverable damages. Since New York law encompassed the "significant contacts" choice of law rule, the only issue before the court was whether the law of the forum prevailed. By expanding the reasoning in *The Tungus*, the court allegedly found support for its decision that New York law was applicable. Three months later, a federal district court entertained *Harris v. United Airlines*,[132] a case which arose out of the same crash as *Thomas*. Faced with the same issue,[133] the court held that federal choice of laws rule must supersede state law. Supporting its decision on

[123] *E.g.*, Hess v. United States, 361 U.S. 314 (1960); Western Fuel Co. v. Garcia, 257 U.S. 233 (1921). *See* Note, 34 J. AIR L. & COM. 651, 657 (1968) (cases cited in n.54).

[124] Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963) (significant contact doctrine).

[125] *See* Note, 34 J. AIR L. & COM. 651, 659 (1968) (cases cited in n.80).

[126] 10 Av. Cas. 17,179 (1967) (not officially cited).

[127] Scott v. Eastern Air Lines, Inc., 264 F. Supp. 673 (D.C. Pa. 1967).

[128] Note 11 *supra*.

[129] 10 Av. Cas. at 17,180.

[130] Scott v. Eastern Air Lines, 399 F.2d 14 (3d Cir.), *cert. denied*, 393 U.S. 979 (1968).

[131] 54 Misc.2d 540, 281 N.Y.S.2d 495 (Sup. Ct. N.Y. 1967).

[132] 275 F. Supp. 431 (D.C. Ia. 1967).

[133] Although the plaintiff brought suit on diversity jurisdiction alleging the tort was non-maritime and thus the law of the forum controlled, the court held that it was a maritime action and subsequently adjudicated the maritime choice of law issue. 275 F. Supp. 431 (D.C. Ia. 1967).

the first hearing in *Scott* and the reasoning therein, the court held that the substantive law of the state which statute is borrowed by maritime law was applicable. The court assumed that Illinois law was the proper law. Discontinuing his suit without prejudice, Harris' representative sought relief in the New York courts.[134] Subsequently, the *Thomas* and *Harris* cases were combined with two other cases arising out of the same crash and were heard simultaneously before the Appellate Division of the New York Supreme Court.[135] In reversing the lower court's decision, the court deduced that enforcement of the forum's conflict of laws rule extended too far the reasoning set-forth in *The Tungus*.[136] Relying on the district court's opinion in the *Harris* decision and the first hearing in the *Scott* decision for the rule that federal choice of law is supreme in admiralty cases when the action arises from wrongful death occurring within state waters, the court held that the substantive law of the state whose statute is borrowed by admiralty is applicable, not the law of the forum. It assumed that admiralty adopts the statute of the state where the tort took place and decided that Illinois law must be employed. Following this reasoning, a federal court is not bound by the choice of law rule of the forum, regardless of the jurisdictional basis of the suit, when determining which state death statute is adopted by admiralty.[137] In other words, the rights of an injured party should not be determined differently on the "law side" and the admiralty side of the court.[138] Moreover, state courts must follow the same rule.[139A]

2. *Lex Loci Delicti or Significant Contacts in Admiralty.*

The *Thomas* and *Harris* decisions might have been decided to the contrary if the plaintiffs had pursued the maritime choice of law rule.[139B]

[134] Harris v. United Air Lines, Inc., 158 N.Y.L.J. 102-16 (Sup. Ct. N.Y., Nov. 1968).

[135] Thomas v. United Air Lines, Inc., 290 N.Y.S.2d 753, 30 A.2d 32 (1968); Harris v. United Air Lines, Inc., 290 N.Y.S.2d 757 (1968); Zabor v. United Air Lines, Inc., 290 N.Y.S.2d 753 (1968); Rarey v. United Air Lines, Inc., 290 N.Y.S.2d 757 (1968).

[136] However, once admiralty has chosen the state death statute to fill the void (regardless of the conflict of laws rule used), a state choice of law rule which is not a procedural nicety [Levenson v. Dupree, note 122 *supra*] or offensive to a right created by maritime law [The *Tungus*, note 97 *supra* and *Hess*, note 108 *supra*; Kenny v. Trinidad Corp., 349 F.2d 832 (5th Cir.), *cert. denied*, 382 U.S. 1030 (1966)], might be argued to apply under the reasoning in *The Tungus* and *Hess*. Since admiralty is not bound by *Erie*, note 116 *supra*, and *Klaxon*, note 117 *supra*, a court could characterize the rule as merely procedural, and thus, not binding on the court. Moreover, the court could interpret the meaning of the term "law" under the adopted state's statute (as used in *The Tungus* and *Hess*) as reference to the "local law" of the state and not the "entire law" which includes the state conflict of laws rule; thus, requiring admiralty to interpret the internal law of the state which statute is adopted. Conversely, there is a possibility that admiralty would draw an analogy to the *Renvoi Doctrine*. Under this theory, the court could first, through its own choice of laws rule, determine which state statute and substantive law is applicable. Thereafter, the court would look to state law and might decide that it should apply the "entire law," *viz.*, conflict of laws rule of the selected state as interpreted from *The Tungus*. Using this method, the court might find itself adjudicating the suit under the internal law of a state other than the one which death statute was first adopted. *See generally*, RESTATEMENT, CONFLICT OF LAWS, Proposed Official Draft, Part I, sec. 8 (1967) and cases cited at 38-39.

[137] Notes 132-34 *supra* (cases cited therein). Since these cases are based on the first hearing in *Scott* which has been reversed, their authority may be questioned in later cases.

[138] Pope & Talbot, Inc. v. Hawn, 346 U.S. at 411; Massaro v. United States Lines Co., 307 F.2d 299 (3d Cir. 1962); J.B. Efferson Co. v. Three Bays Corp., 238 F.2d 611 (5th Cir. 1956).

[139A] *See* Thomas v. United Air Lines, Inc., 290 N.Y.S.2d 753, 30 A.2d 32 (1968); Carlise Packing Co. v. Sandanges, 259 U.S. 255 (1922).

[139B] Just prior to the printing of this article the *Thomas*, *Harris*, *Rarey* and *Zabor* cases were heard before the New York Court of Appeals. Following the reasoning in *Scott v. Eastern Airlines*

Historically, when an action was brought in a federal court for an act or omission occurring on a foreign vessel, admiralty applied the law of the nation whose flag the ship was flying.[140] By 1922, the rule was more clearly defined as the law of the vessel as proven by the vessel's domicile, registry and flag.[141] However, since the rule had little effect beyond what a local sovereign allowed, its use was limited predominantly to ships on the high seas where there was no territorial sovereign.[142] From this rule evolved the "significant contacts" choice of law theory, espoused by the Supreme Court in *Lauritzen v. Larsen.*[143] In *Lauritzen*, a Danish seaman, who joined a Danish ship while it was temporarily docked in New York, was negligently injured on board in Havana harbor. The seaman brought suit in federal district court seeking relief under the Jones Act. In rejecting the *lex loci delicti* rule as enforceable in admiralty cases and holding Danish law applicable, the court held:

> The test of location of the wrongful act or omission, however sufficient for torts ashore, is of limited application to shipboard torts, because of the varieties of legal authority over waters she may navigate.[144]

Moreover, the Court reasoned that admiralty has always tried to avoid conflicts between competing laws of governments and *states* by ascertaining and valuing the points of contact.[145] This rule was subsequently followed in cases concerning general maritime law.[146]

Admiralty adopted a choice of law rule for wrongful death occurring on United States vessels similar to the rule followed by early courts entertaining a tort action arising on a foreign vessel.[147] If the U.S. vessel was on the high seas[148] or in state waters,[149] admiralty enforced the law of the state of incorporation. As previously noted, passage of the DHSA foreclosed application of state death statutes when wrongful death took place on the high seas.[150] Since then,[151] admiralty has applied the law of

(rehearing *enbanc*), 399 F.2d 14 (3d Cir.), *cert. denied*, 393 U.S. 979 (1968), the court reversed the lower court's decision and held:

> [E]ven if locality alone creates a maritime tort, the court is not precluded from determining which of the competing wrongful death statutes should regulate particular actions. . . . [I]n accordance with *Scott*, the court is permitted to employ a choice of law process to determine which of the competing wrongful death statutes applies in each of these four cases.

Thomas v. Eastern Airlines, Zabor v. Same, Rarey v. Same, Harris v. Same, 11 Av. Cas. 17,121, 17,123 (May 28, 1969).

[140] *E.g.*, La Bourgone, 210 U.S. 95 (1908).

[141] Cunard S.S. Co. v. Mellon, 262 U.S. 100, 123 (1922). *See* Lauritzen v. Larsen, 345 U.S. 571, 584-86 (1952).

[142] Cunard S.S. Co. v. Mellon, 262 U.S. at 123-24.

[143] 345 U.S. 571 (1952).

[144] *Id.* at 583.

[145] *Id.* at 582.

[146] Romero v. International Terminal Operating Co., 358 U.S. 345 (1959); McClure v. United States, 368 F.2d 197 (4th Cir. 1966); Symonette Shipyards, Ltd. v. Clark, 365 F.2d 464 (5th Cir. 1966).

[147] Notes 140-43 *supra.*

[148] *E.g.*, The Hamilton, 207 U.S. 398 (1907).

[149] Patton-Tully Transportation Co. v. Turner, 269 F. 334 (6th Cir. 1920) (Reiterated the reasoning that it would be illogical if the liability of the wrongful person or measure of damages changed whenever a ship crossed state lines). *See also*, Thompson Towing & Wrecking Ass'n v. McGregor, 207 F. 209 (6th Cir. 1913) (may have been in state waters).

[150] Notes 76 & 78 *supra* and accompanying text.

[151] Western Fuel v. Garcia, 257 U.S. 233 (1921).

the place of injury when death occurred in state waters.[152] However, as pointed out in the dictum of *Scott v. Eastern Air Lines* (rehearing *en banc*),[153] previous cases dealt only with wrongful death actions commenced and adjudicated in the state where the wrongful act or omission occurred.[154] Thus, the court in *Scott* found no binding precedent in support of the *lex loci delicti* rule.[155] Moreover, concluding that Congress did not intend to limit remedies under state law solely to deaths occurring in a state's territorial waters,[156] the court chose to fashion its own choice of law rule by analogy to *Lauritzen*.

D. *Interpretation Of Internal State Law*

Quite aside from the question of whether the federal or state choice of law rule is applicable in an action for wrongful death occurring in state waters is the issue raised by the Supreme Court in *Goett v. Union Carbide Corp.*[157] Interpreting its language in *The Tungus* and *Hess* decisions, the Court in *Goett* reasoned that it is a question of state law as to the substantive law applicable in maritime death cases accruing from wrongful acts within its waters. Accordingly, a state could enforce the law generally applicable to wrongful death actions brought pursuant to its death statute, or "choose to incorporate [within its substantive law] the general maritime law's concepts of unseaworthiness and negligence."[158] Thus, a court (state or federal), entertaining a wrongful death action on the basis of unseaworthiness, must decide whether the death statute of the state encompasses the standard of care of unseaworthiness. In *The Tungus*, the appellate court viewed unseaworthiness as a "wrongful act" within New Jersey's death statute.[159] However, another appellate court construing the same statute in a different case was of the opinion that "negligence" and "default" covers the doctrine of unseaworthiness.[160] Since the precise language of a death statute does not seem to be controlling, many courts have held that the particular state statute under consideration granted a cause of action based on unseaworthiness.[161] However, regardless of

[152] *E.g.*, The Tungus v. Skovgaard, 358 U.S. 588 (1959); United Pilot's Ass'n v. Halecki, 358 U.S. 613 (1959); Hill v. Waterman S.S. Corp., 251 F.2d 655 (3d Cir.), *cert. denied*, 359 U.S. 297 (1959); Levinson v. Dupree, 345 U.S. 641 (1953).

[153] 399 F.2d 14 (3d Cir.), *cert. denied*, 393 U.S. 979 (1968). Notes 126-31 *supra* and accompanying text. Note, 34 J. AIR L. & COM. 651 (1968).

[154] *See* Note, 34 J. AIR L. & COM. 651, 657 (1968) (cases cited in n.54).

[155] The court made no mention of the *Thomas*, note 135 *supra*, or *Harris*, note 132 *supra*, decisions which profess that admiralty's choice of laws rule in this situation is the *lex loci delicti* rule. This may be due to the fact that both cases relied on the first hearing of *Scott*, which was completely reversed on rehearing *en banc*.

[156] 399 F.2d at 26. *See* Note, 34 J. AIR L. & COM. 651, 657-58 (1968).

[157] 361 U.S. 340 (1960).

[158] *Id.* at 342.

[159] 252 F.2d 14 (3d Cir. 1957).

[160] Halecki v. United N.Y. & N.J. Sandy Hook Pilots Ass'n, 251 F.2d 708 (2d Cir.), *aff'd* on this issue, 358 U.S. 613 (1959).

[161] The Tungus v. Skovgaard, 358 U.S. 588 (1959) (N.J. law); Halecki v. United N.Y. & N.J. Sandy Hook Pilots Ass'n, 251 F.2d 708 (2d Cir.), *aff'd* on this issue, 358 U.S. 613 (1959) (N.J. law); Cunningham v. Rederiet Vendeggen, A/S, 333 F.2d 308 (2d Cir. 1964) (N.Y. law); Anthony v. International Paper Co., 289 F.2d 574 (4th Cir. 1961) (S.C. law); Goett v. Union Carbide Corp., 278 F.2d 319 (4th Cir. 1960) (W. Va. law); Holley v. the Manfred Stansfield, 269 F.2d 317 (4th Cir. 1959) (Va. law); Maryland *ex rel.* Gladden v. Weyerhauser S.S. Co., 176 F. Supp. 664 (D.C. Md. 1959) (Md. law). *Contra*, Emerson v. Holloway Concrete Prods. Co., 282

whether the death statute encompasses the standard of care of unseaworthiness (absolute duty) or just the reasonable care standard of negligence, the court must then determine the issue of whether a certain state's substantive law incorporates the maritime principle of comparative negligence. Cases professing to apply the maritime rule of comparative negligence usually do so on the theory that the state's death statute allows the deceased's representative the same substantive rights to recover as the deceased would have had had his injury been less than fatal.[162] States refusing to incorporate the rule of comparative negligence reason that actions brought under their death statutes in admiralty should not be determined differently than a suit at law.[163] In a recent case, a federal court espoused the theory that, if a state seeks to enforce the admiralty concept of unseaworthiness, it should also enforce the admiralty doctrine of comparative negligence.[164] Moreover, recognizing the refusal of many courts to enforce the maritime rule in actions for negligence, not unseaworthiness,[165] the court implied that the same state could enforce its concept of contributory negligence to bar recovery if the cause of action was for negligence.[166] Once these issues are determined, the law of a particular state may still not be clear for the following reason: If a federal court has determined a question of state law that was not previously adjudicated by the state involved, such determination would be useless as a precedent if a state court subsequently held the exact opposite on the same issue.[167] With

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F.2d 271 (5th Cir. 1960) (Fla. law); Lee v. Pure Oil Co., 218 F.2d 711 (6th Cir. 1955) (Tenn. law); Graham v. A. Lusi, Ltd., 206 F.2d 223 (5th Cir. 1953) (Fla. law); Babin v. Lykes Bros., S.S. Co., 94 So.2d 715 (Ct. App. La. 1957) (La. law).

[162] Holley v. The Manfred Stansfield, 269 F.2d 317 (4th Cir. 159); Halecki v. United N.Y. & N.J. Sandy Hook Pilots Ass'n, 251 F.2d 708 (2d Cir.), *aff'd* on this issue, 358 U.S. 613 (1959); Vassollo v. Nederl-Amerik Stoomr Moots Holland, 162 Tex. 52, 344 S.W.2d 421 (Sup. Ct. 1961); Weed v. Biffrey, 201 So.2d 771 (App. Ct. 1967).

[163] Curd v. Todd-Johnson Dry Dock, 213 F.2d 864 (5th Cir. 1954); Graham v. A. Lusi, Ltd., 206 F.2d 223 (5th Cir. 1953); Truelson v. Whitney & Bodden Shipping Co., Inc., 10 F.2d 412 (5th Cir. 1926); Hornsby v. The Fishmeal Co., 285 F. Supp. 990 (W.D. La. 1968); Helgeson v. United States, 275 F. Supp. 789 (S.D.N.Y. 1967). See generally cases in note 165 *infra*.

[164] Curry v. Fred Olsen Lines, 367 F.2d 921, 928-30 (9th Cir. 1966).

[165] Olsen v. New York Central Ry. Co., 341 F.2d 233 (2d Cir. 1965) (N.Y. law); Anthony, Adm. v. International Paper Co., 289 F.2d 574 (4th Cir. 1961) (S.C. law); Niepert v. Cleveland Elec. Illum. Co., 241 F.2d 916 (6th Cir. 1957) (Ohio law); Curtis v. A. Garcia Y. Cia., 241 F.2d 30 (3d Cir. 1957) (Pa. law); Hartford Acc. & Indem. Co. v. Gulf Refining Co., 230 F.2d 346 (5th Cir. 1956) (La. law); Klingseisen v. Costanzo Transp. Co., 101 F.2d 902 (3d Cir. 1939) (Pa. law); Feige v. Hurley, 89 F.2d 575 (6th Cir. 1937) (Ky. law); Monongahela River Consol. Coal & Coke Co. v. Schinnerer, 196 F. 375 (6th Cir. 1912) (Ark. law); Quinette v. Bisso, 136 F. 825 (5th Cir. 1905) (La. law); Mooney v. Carter, 152 F. 147 (5th Cir. 1907) (Ala. law); Byrd v. Napoleon Ave. Ferry Co., 125 R. Supp. 573 (E.D. La.), *aff'd*, 227 F.2d 958 (5th Cir. 1955) (La. law); Cromartie v. Stone, 194 N.C. 663, 140 S.E. 612 (1927) (N.C. law); Roswall v. Grays Harbor Stevedore Co., 138 Wash. 390, 244 P. 723 (1926) (Wash. law).

[166] 367 F.2d at 929-30.

[167] *Compare*, Graff v. Parker Bros. & Co., 204 F.2d 705 (5th Cir. 1953) and Truelson v. Whitney and Bodden Shipping Co., 10 F.2d 412 (5th Cir. 1926) (federal court held that contributory negligence was a bar to recovery under Texas law in an action for wrongful death in Texas waters), *with* Vassollo v. Nederl-Amerik Stoomr Moots Holland, 162 Tex. 52, 344 S.W.2d 421 (Sup. Ct. 1961) (Supreme Court of Texas held that that comparative negligence was applicable under its wrongful death statute). *Compare*, Emerson v. Holloway Concrete Products Co., 282 F.2d 271 (5th Cir. 1960) and Graham v. A. Lusi, Ltd., 206 F.2d 223 (5th Cir. 1953) (federal court held that substantive common law not general maritime principles apply to actions for wrongful death in Florida waters), *with* Weed v. Bilbrey, 201 So. 2d 771 (App. Ct. Fla. 1967) (court held that the Florida wrongful death statute encompasses admiralty's concept of comparative negligence).

such instances having developed, reliance on past decisions concerning admiralty actions for wrongful death in state waters can be futile.[168]

III. Conclusion

Although most courts either espouse or at least accept the strict locality test for justifying application of admiralty jurisdiction,[169] it seems that such a test should be used merely as a limitation[170] and that the "locality plus" test is the most equitable rule. Actions in recent aviation cases concerning deaths occurring on state navigable waters[171] point out the anomalous result of subjecting aircraft, unhampered by geographical boundaries,[172] to rules developed solely for enhancement of sea commerce. Moreover, air commerce is much too important to be governed by a body of law that seems to be in a state of constant confusion.[173]

To cite an example, the Supreme Court in *Southern Pacific Co. v. Jensen*,[174] rationalizing its ruling—that application of a state's compensation act in an admiralty action for wrongful death arising on state waters was unconstitutional—on grounds that it would interfere with uniformity in maritime law,[175] *i.e.*, that the question was not of local concern, but national in nature. However, in more recent decisions the Court has reasoned that the outcome of such a suit is of local importance.[176] In *The Tungus* and *Hess* the slim majority viewed uniformity in admiralty as not of paramount importance where admiralty adopts a state right of action for wrongful death to fill the void in maritime law.[177] They reasoned that the right must be measured by the "conditions and limitations the creating State has attached."[178] Conversely, the dissenters, hanging onto the uniformity argument, rationalized that such a right should be weighed only by admiralty's standards.[179] This argument is based predominantly on a recent case concerning an injury,[180] not death. This deduction appears somewhat contrary to Congressional intent in passing the DHSA. If Congress had felt at that time that uniformity of results in an action accruing from wrongful death occurring within state navigable waters was significant, it would be reasonable to assume that it would have passed a statute covering such actions. To the contrary, legislative history of the DHSA reveals Congress' intent to leave to the states as much control as possible over death actions arising from fatal injuries incurred on their territorial waters.[181] However, the illogical distinction between fatal

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[168] *Id.*
[169] Notes 27, 107, 119-20, & 126-35 *supra* and accompanying text.
[170] Note 29 *supra*.
[171] Notes 58-60 & 126-35 *supra*.
[172] Moore & Palaez, note 57 *supra* at 34.
[173] *Id.* at 37.
[174] Notes 80-82 *supra* and accompanying text.
[175] *Id.*
[176] Notes 83, 96-115 *supra* and accompanying text.
[177] Notes 96-115 *supra* and accompanying text.
[178] Notes 102 & 110 *supra* and accompanying text.
[179] Notes 104-05 & 115 *supra* and accompanying text.
[180] Note 106 *supra*.
[181] Notes 103 & 156 *supra*.

and non-fatal injuries, which determines which substantive law is to be applied, seems unreasonable.[182] This peculiarity might be credited to Congress' failure to clarify maritime law by legislation, thus, leaving the determinations to the myriad lower federal courts.

Recent aviation cases caught in this uncertain body of law because of the strict locality test, have challenged the choice of law rule followed in admiralty actions.[183] From these cases it appears highly probable that admiralty's choice of law rule is applicable. Moreover, it is likely that admiralty's conflicts rule is "significant contacts."[184] However, if a claimant is unsatisfied in the future with the probable outcome of his suit under admiralty's conflicts rule, he may seek to apply the *Renior Doctrine*.[185] A plausible result would be admiralty's interpretation of internal law of a state other than the one which death statute was first adopted. Such result would add greater complexity to an already confusing body of law. Adding to the chaos is the fact that a federal court's interpretation of a question of state law that was not previously determined by the state involved may go for naught as precedent when a state court decision (taking the opposite position) is handed down on the same point.[186]

In sum, it is submitted that Congress should legislate to alleviate some of the muddle in maritime law, that is, to clarify the law as it now stands. One possible solution is the passage of a uniform wrongful death statute for deaths occurring in state navigable waters. Moreover, since air commerce has pecularities different from those of commerce on the sea, Congress should provide uniform law specially suited to flights over land and water.[187]

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[182] Note 107 *supra* and accompanying text.
[183] Notes 126-39B *supra* and accompanying text.
[184] Notes 140-56 *supra* and accompanying text.
[185] Note 136 *supra*.
[186] Notes 167-68 *supra* and accompanying text.
[187] Moore & Palaez, note 57 *supra* at 37-38.

NOTES

Airports — Flight Paths — Police Power v. Eminent Domain

During the past four decades, aviation and real estate law practitioners have continually faced the problem of choosing the proper remedy to clear approach and takeoff flight paths around airports. In order to protect the public interest in airports by preventing the construction or growth of hazards in flight approach zones, the federal, state and municipal governments have increasingly utilized police power zoning.[1] Proponents of aviation had hoped that by invoking "police power"[2] instead of the power of eminent domain[3] it might be possible to avoid the expense of litigation required by constitutional provisions which prohibit the taking of private property without due process of law. Additionally, proper utilization of the "police power" in lieu of eminent domain has the advantage of obviating compensation of the owner for the property taken.[4] This article will examine the propriety of exercising police power vis-à-vis the power of eminent domain with particular emphasis on the constitutionality of airport zoning ordinances purporting to limit or restrict the use of land near or surrounding airports; a recent decision of the Kentucky Court of Appeals, *Shipp v. Louisville & Jefferson County Air Board*[5] brings this issue into sharp focus.

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[1] C. RHYNE, MUNICIPAL LAW § 22-22, at 489 (1957).

[2] The "police power" of a state is derived from the U.S. CONST., amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[3] Eminent domain has been defined as " . . . the power of the sovereign to take property for public use without the owner's consent upon making just compensation." NICHOLS, THE LAW OF EMINENT DOMAIN § 1.11, at 7 (3d ed. 1964).

The right of eminent domain, although not specifically granted to the federal, state, or local governments by the United States Constitution, is recognized as an incident of sovereignty which is absolute except as restricted by the Fifth and Fourteenth Amendments of the United States Constitution. *See* Cincinnati v. Louisville & Nashville R. Co., 223 U.S. 390 (1912); United States v. 2902 Acres of Land, 49 F. Supp. 595, 596 (D. Wyo. 1943). The relevant clause of the Fifth Amendment restricting the federal government's use of eminent domain states that no person shall " . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation." The analogous clause of the Fourteenth Amendment restricting a state's right to utilize condemnation states that no state " . . . shall deprive any person of life, liberty, or property, without due process of law."

[4] E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 32.04, at 276 (3d ed. 1964).

The legal distinction between "police power" and "eminent domain" is clear. "In the exercise of the police power, public authority is empowered to require everyone so to use and enjoy his own property as not to interfere with the general welfare of the community in which he lives. To be valid, restriction or prohibition imposed by government as to the use or enjoyment of property must be within the reason and principle of this individual duty, and if so the property owner must submit, without remedy, for any inconvenience or loss suffered by him. This is regulation, not a taking. Under the police power the public welfare is promoted by regulating and restricting the use and enjoyment of property by the owner; under eminent domain, the public welfare is promoted by taking the property from the owner and appropriating it to some particular use." *Id.* at 272-73.

[5] 431 S.W.2d 867 (Ky. 1968), *cert. denied*, 393 U.S. 1088 (1969).

In *Shipp*, the Kentucky Airport Zoning Commission[6] brought an action against the owner of residential property adjacent to a municipal airport alleging that the owner had violated certain rules and regulations of the Commission. The Louisville & Jefferson County Air Board[7] was subsequently allowed to intervene. Specifically, the County Air Board maintained that the defendant-property owner had allowed two oak trees[8] to grow to such height that the trees interfered with the proper use of the airport's VASI equipment.[9] The CAB concluded that the trees constituted a hazard to the safe operation of airplanes landing and taking off from the airport, and intervened in order to abate this nuisance. The trial court found for the plaintiff on the theory that it had "a 'prescriptive right' to the public, unobstructed use of the stratum of air space over appellant's (defendant's) property for the purpose of the landing and take-off of aircraft from its airfield, including the space in which its VASI equipment operates."[10] Consequently, the trial court held that the CAB should be allowed to go upon defendant's property to enable it to top the two trees to a height not exceeding 20 feet.[11] The defendant appealed on the basis that: (1) The law does not recognize prescriptive air easements;[12] (2) if the law does allow such easements, they should be

[6] The Kentucky Airport Zoning Commission brought its suit under Ky. Rev. Stat. § 183.873 (1962): "In addition to any other penalty proscribed in this chapter, the commission may institute in any court of competent jurisdiction, an action to prevent, restrain, correct or abate any violation of this chapter or of any zoning regulations adopted, or of any order or ruling made in connection with their administration or enforcement." The trial court dismissed the complaint for the reason that the Kentucky Airport Zoning Commission's proper remedy was under K*ff*. REV. STAT. § 183.872 (1962): "In any case in which it is desired to remove, lower or otherwise terminate a nonconforming use; or the approach protection necessary cannot, because of unconstitutional limitations, be provided by acquisition of property rights rather than by zoning regulations; or it appears advisable that the necessary approach protection be provided by acquisition of property rights rather than by zoning regulations, the department, commission, air board or boards, or governmental unit may acquire by purchase, grant, condemnation or otherwise, such air right, easement, or other estate or interest in the property or nonconforming use in question as may be necessary to effectuate the purposes of this chapter."

[7] Cited hereinafter as CAB.

[8] The facts in *Shipp* were stipulated. At the time of trial, the two pin oak trees were 50.9 and 39.7 feet respectively. These trees grow at a rate of one to one and one-half feet per year and exceeded the "safe" height of 20 feet when the defendant purchased the property in 1963. 431 S.W.2d at 869.

[9] VASI equipment is described in *Shipp* as follows: "This equipment projects three color bars or layers of light for some distance from runways used by landing aircraft. While landing, the pilot endeavors to keep within the middle color bar. If he flies into either of the other color bars, he is too high or too low for instrument landing and can correct his course accordingly. Any obstruction in the path of the space covered by these color bars that extends more than twenty-five feet high will interfere with the desired performance of the *VASI* equipment. It is claimed that the Federal Aviation Administration will not permit the use of this equipment until the trees are cut low enough to allow the light to pass." *Id.* at 868-69 n.1.

[10] *Id.* at 868.

[11] The plaintiff was, however, required to post bond for any consequential damage to the defendant's property caused by the cutting. *Id.* at 869.

[12] There is dictum in the *Shipp* case that a prescriptive air easement will be recognized if the trespasses over another's land are in the same place as to linear space and altitude. If the CAB had exercised adverse rights in the same airspace for a period of fifteen years, it is likely that the court would have found a prescriptive right. *Id.* at 870.

See also Thrasher v. Atlanta, 178 Ga. 514, 173 S.E. 817 (1934) where the court states that the airplane's flight over private property does not constitute an occupation in the sense of dominion and ownership and Smith v. New England Aircraft Co., 270 Mass. 511, 170 N.E. 385 (1930) where the court states that no prescriptive right to any particular way of passage for aircraft may be acquired by numerous trespasses which are not in the same place.

With respect to prescriptive easements generally, see 3 R. POWELL, THE LAW OF REAL PROPERTY ¶ 413 (1967).

restricted to their actual use and exercise during the period of time the prescriptive right was acquired; and (3) the decision of the trial court violates plaintiff's rights under the Fourteenth Amendment of the United States Constitution.[13] *Held, reversed*: The CAB has not acquired a prescriptive right; therefore, since the defendant's right to enjoy the trees on his property was acquired prior to the adoption of the rules and regulations applicable to the operation of VASI equipment,[14] the defendant's right is constitutionally protected. The trees can be taken by the CAB only through the exercise of condemnation proceedings,[15] in spite of the fact that the defendants have violated local zoning rules.

The question arises whether *Shipp* dashes the hopes aviation proponents had of using the "police power" to pass zoning ordinances regulating the height of structures near airports. As previously mentioned, a proper use of the "police power" would obviate the usual requirement of compensating a property owner for losses.[16] If the decision in *Shipp* is closely analyzed, it appears that a state or municipality is not prohibited from passing, under its "police power," zoning ordinances regulating the height of trees and structures in the airspace adjacent to airports. The court merely holds that airport zoning ordinances cannot be used to destroy property rights existing prior to the adoption of the regulations under the Federal Aviation Act of 1958.[17] The implication of the decision is that the "police power" can be used in lieu of condemnation proceedings to "take-away" property rights acquired after the enactment of the federal regulations. The court states quite emphatically: "After the adoption of the rules and regulations under . . . [the Federal Aviation Act of 1958], no property owner in the path of the rays of the VASI equipment may erect or allow to grow any structure or tree so as to interfere with the operation of such equipment."[18]

An air easement has been defined as an easement of right to the navigation of airspace over designated land and to the use of land as an incident to air navigation. Johnson v. Airport Authority of the City of Omaha, 173 Neb. 801, 115 N.W.2d 426 (1962).

[13] Although the decision does not specifically mention that the defendant relied upon the Fourteenth Amendment, it is clear that this is the relevant amendment.

[14] It is unclear from the decision exactly what federal rules and regulations the court is concerned with. It appears that the only applicable regulation adopted under 49 U.S.C. § 1301 (24) is 14 C.F.R. § 91.79 (1964) (minimum safe altitudes of flight). This regulation, however, does not specifically mention the use of VASI equipment.

[15] 431 S.W.2d at 870. Condemnation proceedings could be brought by the CAB, pursuant to KY. REV. STAT. 183.133(4), (5) (1962):

"(4) The board may acquire by contract, lease, purchase, gift, condemnation or otherwise any real or personal property, or rights therein, necessary or suitable for establishing, operating or expanding airports and air navigation facilities. The board may erect, equip, operate and maintain on such property, buildings and equipment necessary and proper for airport or air navigation facilities. The board may dispose of any real or personal property, or rights therein, which, in the opinion of the board are no longer needed for operating or expanding the airport or air navigation facilities.

(5) The board or any governmental unit may by resolution reciting that the property is needed for airport or air navigation purposes direct the condemnation of any property, including navigation or other easements. The procedure for condemnation shall conform to the procedures set out in KY. REV. STAT. 416.120, or in the alternative, as nearly as practicable to KY. REV. STAT. 177.081 to 177.089.

[16] *See, e.g.*, White's Appeal, 287 Pa. 259, 134 A. 409 (1926).

[17] Federal Aviation Act of 1958, 72 Stat. 737, *as amended*, 76 Stat. 143, 49 U.S.C. § 1301(24) (1964).

[18] 431 S.W.2d at 870.

Thus, if the trees were shorter than 20 feet when the federal regulation[19] was adopted and the property owner allowed the trees to grow to a height exceeding 20 feet, it seems clear that this Kentucky court would have allowed the CAB to use its "police power" to eliminate the hazard. But since the trees were more than 20 feet tall when the property was purchased in 1963, the defendants had acquired a property right in the trees that could be disturbed only by eminent domain. If the trees reached the height of 20 feet after the federal regulation became effective but prior to the enactment of the local zoning ordinance, it appears that the *Shipp* court would have also considered this situation ripe for utilization of the "police power."

The *Shipp* opinion must be examined in the light of decisions from other jurisdictions to determine whether it represents the weight of authority. Prior to analyzing decisions from other jurisdictions, however, it is necessary to consider the relevant federal statute and regulation. The federal statute states: "There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States."[20] The same statute defines navigable airspace as "airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and *shall include airspace needed to insure safety in take-off and landing of aircraft* [Emphasis added.]."[21] The minimum altitudes of flight are defined as the airspace above 1000 feet in congested areas and above 500 feet in other areas "except when necessary for takeoff or landing."[22] It has often been asserted by the federal government that invasions of the airspace below the minimum altitudes of flight are privileged if the aircraft is landing or taking off.[23] In *United States v. Causby*,[24] the court held that flights below 1000 feet in congested areas and 500 feet in other areas are not within the navigable airspace even when aircraft are landing or taking off.[25] Although the definition of navigable airspace was subsequently

[19] 14 C.F.R. § 19.79 (1964).

[20] Federal Aviation Act of 1958, 72 Stat. 740, 49 U.S.C. § 1304 (1964).

[21] Federal Aviation Act of 1958, 72 Stat. 737, *as amended*, 76 Stat. 143, 49 U.S.C. § 1301(24) (1964).

[22] The relevant section of 14 C.F.R. § 91.79 (1964) read as follows:

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

(a) *Anywhere.* An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

(b) *Over Congested Areas.* Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

(c) *Over other than Congested Areas.* An altitude of 500 feet above the surface, except where open water or sparsely populated areas. In that case, the aircraft may not be operated closer than 500 feet to any persons, vessel, vehicle, or structure.

(d) (omitted)

[23] *See, e.g.*, United States v. Causby, 328 U.S. 256 (1946).

[24] *Id.*

[25] *Id.* at 264. At the time *Causby* was decided, "navigable airspace," by regulation, was defined as the airspace above 1000 feet in congested areas. Civil Aeronautics Reg., 14 C.F.R. § 60.17 (1956). These regulations, it is apparent, dealt only with aircraft in flight and not with aircraft taking off or landing. *See* Aaron v. United States, 311 F.2d 798 (Ct. Claims 1963). Neiswonger v. Goodyear Tire & Rubber Co., 35 F.2d 761 (N.D. Ohio 1929). Thus, until 1958, glide paths used in landing and taking off were not in the public domain.

amended to include glide paths,[26] it still appears that a flight within these zones and below the minimum altitudes of flight is not absolutely privileged.[27]

In *Matson v. United States*,[28] the plaintiffs were owners of property adjacent to a municipal airport. They brought an action to recover compensation for the "taking" of property by the United States through its operation of military aircraft below minimum altitudes of flight while landing and taking off. The court relied upon *Causby* and concluded that fairness requires that the landowners be reasonably compensated for operations that immediately and directly limit the use of their properties.[29] In reaching its decision, the court mentioned that the change in the definition of "navigable airspace" would not affect the plaintiffs' right to recover.[30] "Although today navigable airspace with its public right of transit, . . . includes the glide, its use by the United States or other aeroplane operators at heights below the minimum altitudes of flight except where necessary for take-off or landing, may require compensation."[31] This dictum became law when the Supreme Court decided *Griggs v. Allegheny County*.[32] The Court held that where noise from aircraft landing and taking off made a home located near the end of the runway unbearable for residential use, there was a "taking" of an air easement over the property. The Court reached this conclusion in spite of the fact that "navigable airspace" then included glide zones. A recent case decided by the Washington Supreme Court is even more explicit than *Griggs*: "A landowner must be compensated for any of his property that has been appropriated and declared to be within the public domain of navigable airspace."[33] Thus, it seems clear that the federal, state and local governments cannot utilize their "police power" to obtain air easements in glide paths below the minimum altitudes of flight by arguing a privilege based solely upon the Federal Aviation Act and federal regulations.[34]

Since municipalities and states have found the federal statute and regu-

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[26] See note 21 *supra*.

[27] The amendment has at least a twofold effect. Aircraft cannot be enjoined from flying through approved glide paths. Allegheny Airlines Inc. v. Village of Cedarhurst, 238 F.2d 812 (6th Cir. 1956); City of Newark v. Eastern Airlines, 159 F. Supp. 750 (D.N.J. 1958); Loma Portal Civic Club v. American Airlines, Inc., 37 Cal. Rpts. 253, *aff'd*, 61 Cal. 2d 582, 39 Cal. Rpts. 708, 394 P.2d 548 (1964); Gardner v. County of Allegheny, 382 Pa. 88, 114 A.2d 491 (1955). Glide paths cannot be subjected to inhibiting municipal ordinances. Allegheny Airlines, Inc. v. Village of Cedarhurst, *supra*.

[28] 171 F. Supp. 283 (Ct. Claims 1959).

[29] *Id.* at 286.

[30] Matson v. United States was decided prior to the amendment of the definition of "navigable airspace." Consequently the courts reference to the amendment is pure dictum.

[31] *Id.* at 285.

[32] 369 U.S. 85 (1962).

[33] Milk v. Orcas Power & Light Co., 56 Wash. 2d 807, 822, 355 P.2d 781, 789 (1960).

[34] Although the present statute and regulations do not authorize the use of zoning to obtain air easements, the Federal government does have a constitutional basis for adopting zoning statutes which limit the height of structures adjacent to airports. Congress' power to regulate interstate commerce under art. 1, § 8 of the Constitution includes the power to remove structures which interfere with the flights of aircraft. A second constitutional basis for the adoption of federal zoning laws is Congress' power to protect the post roads which include established air routes. 39 U.S.C. § 481 (1946). For an excellent discussion of the constitutionality of federal zoning of airport glide paths, *see* Comment, *Federal Control of Land to Protect Airport Approaches*, 48 Nw. U.L. Rev. 343 (1953).

lations inadequate as a device to acquire air rights through glide paths, a number of states and municipalities have passed "police power" statutes, ordinances, and regulations which attempt to control the height of structures and objects within a specified distance of airports.[35] Property owners have often challenged this attempted regulation of the use of property as being an unconstitutional "taking" of private property without compensation. The property owners have usually succeeded, and airport zoning ordinances have been held unconstitutional.[36] Yet some states, such as Florida, have taken the position that ordinances regulating the height of structures are a proper exercise of the "police power" and not a "taking" of property.[37]

The first case to consider the constitutionality of airport zoning ordinances *per se* was *Mutual Chemical Co. v. City of Baltimore*.[38] The court held that the city could not, through the guise of a zoning ordinance, confiscate the property of an individual. The court indicated that substantial rights of a property owner can be taken only through the exercise of eminent domain.[39]

A similiar result was reached in *Dutton v. Mendocino County*.[40] In *Dutton*, plaintiff owned certain property adjacent to a municipal airport. In 1941, an ordinance was enacted which limited the height of structures on plaintiff's land to a maximum of 20 to 30 feet. Plaintiff desired to use the land for industrial purposes. This use would necessitate the building of structures in excess of the limits specified in the ordinance. Thus, plaintiff brought an action asking for a declaratory judgment that the ordinance was violative of the California Constitution which prohibited the state from "taking" private property without just compensation.[41] The court held that the ordinance did not merely regulate the use of plaintiff's land and was unconstitutional as a "taking" of private property

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[35] *See, e.g.*, PA. STAT. ANN., tit. 2, § 1552 (Purdon 1963):

> It is hereby found that an airport hazard endangers the lives and property of users of the airport and of occupants of land in its vicinity, and also, if of the obstruction type, in effect reduces the size of the area available for the landing, take-off and maneuvering of aircraft, thus tending to destroy or impair the utility of the airport and the public investment therein. Accordingly, it is hereby declared, (a) that the creation or establishment of an airport hazard is a public nuisance and an injury to the community served by the airport in question, (b) that it is therefore necessary in the interest of the public health, public safety and general welfare that the creation or establishment of airport hazards be prevented, and (c) that this should be accomplished to the extent legally possible by exercise of the police power without compensation. It is further declared that both the prevention of the creation or establishment of airport hazards, and the elimination, removal, alteration, mitigation or marking and lighting of existing airport hazards, are public purposes for which political subdivisions may raise and expend public funds and acquire land or property interests therein.

Also see N.Y. GEN. MUNICIPAL LAW § 356 (McKinney 1965).

[36] 8 AM. JUR. 2d, Aviation 350 (1962); *accord*, Annot., 77 A.L.R. 2d 1355, 1362 (1961).

[37] Sarasota-Manatee Airport Auth. v. Harrell's Candy Kitchen, 5 Av. Cas. 17,906 (Fla. Cir. Ct. 1957), *aff'd*, 111 So. 2d 439 (Fla. Sup. Ct. 1959); Burnham v. Beverly Airways, Inc., 311 Mass. 682, 42 N.E.2d 575 (1945).

[38] 1 Av. Cas. 804 (Md. Cir. Ct. 1939).

[39] *Id.* at 806.

[40] U.S. Av. 7 (Calif. Super. Ct. 1948).

[41] CAL. STAT. ANN., Constitution, Art. 1, § 14 (1954).

without just compensation.[42] The court further provided that the act was "one of eminent domain and subject to the obligations and limitations which attend an exercise of that power."[43] In reaching its conclusion, the *Dutton* court relied upon *House v. L.A. County Flood Control Dist.*[44] and *Mutual Chemical Co. v. City of Baltimore.*[45] In *House*, the California Supreme Court held that the state may take or damage private property without compensating the owner if the action is deemed essential to safeguard public health, safety or morals. If the taking is not prompted by so great a necessity, the state cannot rely upon its "police power".[46] In *Mutual Chemical*, the court held that the zoning of an area surrounding an airport was for the benefit of those interested in aviation rather than for the general public. Since the *Dutton* court felt that the safety of airport glide paths was not within the realm of the "general health, safety or morals" it had no difficulty striking down the ordinance in question.

A perplexing and somewhat anomalous aspect of the *Dutton* decision is the court's hypothetical example of another situation which, though said to be rectifiable only by the exercise of eminent domain, appears to be the ideal situation where "police power" could be used. If the state of California had to appropriate private property in order to straighten a curvy highway, which posed a danger to the driving public, the court maintains that it could do so only by the exercise of eminent domain. It is submitted that a dangerous highway is a threat to the general public and would today be considered an appropriate situation for the exercise of "police power." It is also submitted that, in light of the tremendous increase in the use of air transportation since 1948, airport zoning ordinances are enacted for the general safety of the public. Thus, although *Dutton* has not been rejected by the California courts, there is some question of the continuing vitality of the decision.

The Indiana Supreme Court also recently considered whether a zoning ordinance restricting the height of structures near airports was constitutionally proscribed. In *Indiana Toll Road v. Jankovich*,[47] an action was brought by the airport for damage allegedly sustained as a result of the construction of a toll road in violation of a zoning ordinance. The height of the toll road exceeded the limit set forth in the ordinance. The court held that an ordinance prohibiting construction of buildings exceeding certain heights within a specified distance of an airport without providing for compensation was unconstitutional.[48] The court indicated that it reached its conclusion after applying a two-part test. The first question asked by the court was whether the airspace above land is constitutionally protected. It answered in the affirmative, citing *United States v. Causby* for the

[42] U.S. Av. at 16 (1949).

[43] *Id.* at 12. The court adopted the language appearing in 1 LEWIS, EMINENT DOMAIN 36, at 13 (3d ed. 1907).

[44] 25 Cal. 2d 384, 153 P.2d 950 (1944).

[45] *See* note 35 *supra.*

[46] 25 Cal. 2d at 388-89, 153 P.2d at 952.

[47] 244 Ind. 574, 193 N.E.2d 237 (1963). For a casenote which examines this decision in some depth, see 31 J. AIR L. & COM. 366 (1965).

[48] 244 Ind. at 579, 193 N.E.2d at 242.

proposition that the use of airspace immediately above the land would limit the utility of the land and cause a diminution in its value. The second question concerned whether there had been a constitutionally proscribed taking. The court answered this question in the affirmative as well. It distinguished cases where the owner was merely restricted in the use and enjoyment of his property, and further stated that the federal government itself has recognized the requirement that air easements for glide paths can be acquired only by condemnation proceedings.[49]

The United States Supreme Court granted certiorari[50] in the *Jankovich* case because it appeared that the case involved the validity of airport zoning ordinances under the Fourteenth Amendment. However, in a split decision, the Court later dismissed the writ of certiorari[51] on the ground that the decision of the Indiana Supreme Court rested upon the independent and adequate state ground[52] that the ordinance violated the Indiana Constitution.[53] Although the Supreme Court expressed no opinion with respect to the validity of the ordinance under the Fourteenth Amendment of the United States Constitution, it did conclude that the decision of the Indiana Supreme Court was compatible with the congressional policy embodied in the Federal Airport Act.[54]

The Idaho Supreme Court, in *Roark v. City of Caldwell*,[55] has also concluded that it is unconstitutional to utilize the police power to regulate the height of structures near airports. Plaintiffs purchased 254 acres of agricultural property, 20 of which adjoined Caldwell Municipal Airport. Plaintiff plotted the 20 acre tract for residential purposes which was approved by the city. Plaintiffs sold four lots within the tract before 19 June 1961 when the ordinance in question was enacted. Prior to the enactment of the ordinance, the city issued building permits for construction of homes on two of the lots. Those homes were also constructed prior to 19 June 1961. The ordinance established restricted zones which limited both the uses of the land in a particular zone and the elevation of structures. The ultimate effect of the ordinance was to prohibit the use of the land for any purpose other than agriculture. After considering *United States v. Causby* and *Griggs v. Allegheny County*, the court concluded that "a landowner has a property right in the reasonable use of the airspace above his land which cannot be 'taken' for public use without just

[49] 244 Ind. at 579, 193 N.E.2d at 242. The court relies upon United States v. 4.43 Acres of Land, 137 F. Supp. 567 (N.D. Tex. 1956), and United States v. 48.10 Acres of Land, 144 F. Supp. 258 (S.D.N.Y. 1956).

[50] 377 U.S. 942 (1964).

[51] 379 U.S. 487 (1965).

[52] *See, e.g.*, City of New York v. Central Savings Bank, 306 U.S. 661 (1939); Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Lynch v. New York *ex. rel.* Pierson, 293 U.S. 52 (1934).

[53] 379 U.S. at 490-92.

[54] *Id.* at 494-95. The Federal Airport Act, 49 U.S.C. § 1101 et seq. (1964 ed. and Supp. II), was amended on March 11, 1964 to require as an additional condition of approval of an airport project seeking federal aid that:

> (4) appropriate action, *including the adoption of zoning laws*, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations including landing and take-off of aircraft [Emphasis added.].

Pub. L. No. 88-280, 1964 U.S. CODE CONG. & AD. NEWS at 188.

[55] 87 Idaho 557, 394 P.2d 641 (1964).

compensation."[56] The *Roark* court went beyond the dictum in *Dutton v. Mendocino County* and stated that, even assuming that great public benefit might be derived from maintaining minimum height standards for glide paths, that was not sufficient in and of itself to confiscate private property.[57]

The New Jersey courts have also invalidated ordinances restricting the height of structures near airports;[58] and in 1939, the Attorney General of Michigan rendered an opinion that a zoning law which prohibited the building of any structure within 1000 feet of an airport was unconstitutional and not justifiable under the "police power."[59]

The only states which have directly upheld the constitutionality of airport zoning ordinances are Florida and Alabama.[60] In *Sarasota-Manatee Airport Authority v. Harrell's Candy Kitchen*,[61] the Florida courts considered the constitutionality of an airport zoning regulation. The regulation established in 1945 limited to 28 feet the height of structures which could be built upon the land leased by the Candy Kitchen. After the ordinance had been passed, the Candy Kitchen erected a 41 foot tower for advertising purposes. The Airport Authority brought an action alleging defendant's violation of the ordinance. The Florida circuit court issued an injunction ordering the Candy Kitchen to cut the offending tower to 28 feet. The court stated that the primary function of the tower portion was aesthetic and only for advertisement. It concluded that any functional use of the tower could be accommodated as well with the 10.8 foot basic roof of the structure.[62] "It therefore appears to the court that the . . . [regulations] which were designed to prevent the creation and establishment of airport hazards, bears a substantial relationship to and are necessary for the protection of the public health, safety, and general welfare."[63] The Florida Supreme Court affirmed and added: "Zoning regulations duly enacted pursuant to lawful authority are presumptively valid and the burden is upon him who attacks such regulation to carry the extraordinary burden of both alleging and proving that it is unreasonable and bears no substantial relation to the public health, safety, morals or general welfare."[64]

A 1962 case decided by the Florida district court, *Waring v. Peterson*,[65] reaffirmed *Harrell's Candy Kitchen* and concluded that a zoning ordinance which limited the height of structures in glide paths was a reasonable and

[56] 87 Idaho at 564, 394 P.2d at 645.
[57] 87 Idaho at 567, 394 P.2d at 646.
[58] *See, e.g.*, Yara Engineering Corp. v. Newark, 132 N.J.L. 370, 40 A.2d 559 (1945); Rice v. Newark, 132 N.J.L. 387, 40 A.2d 561 (1945).
[59] U.S. Av. 18 (1939).
[60] Sarasota-Manatee Airport Auth. v. Harrell's Candy Kitchen, note 37 *supra;* Baggett v City of Montgomery, 276 Ala. 166, 160 So.2d 6 (1964). The Massachusetts Supreme Court, in Burnham v. Beverly Airways, Inc., 311 Mass. 682, 42 N.E.2d 575 (1942) recognized by dictum the validity of an airport zoning statute. Also, see Bennington v. Vail, 117 Vt. 395, 92 A.2d 467 (1952).
[61] Note 37 *supra.*
[62] 5 Av. Cas. at 17,907. The implication of the court that advertising is disfunctional is clearly misguided.
[63] *Id.* at 17,909.
[64] 111 So.2d at 443.
[65] 137 So.2d 268.

proper exercise of the "police power."[66] The court went further and asserted that, even if it is "fairly debatable" whether the ordinance is reasonable and a fair exercise of the "police power," a court should not substitute its judgment for that of the legislative authorities.[67]

The Minnesota Supreme Court, although not specifically considering an airport zoning ordinance regulating the height of structures in glide paths, has decided in *State v. Airports Commission*[68] that use of "police power" or power of eminent domain is a discretionary power of an administrative agency.[69] In this case, the Airport Commission refused to grant plaintiffs a license to operate an airport which was considered to be too close to an existing airport. The court held that this refusal was not a "taking of property without compensation,"[70] especially inasmuch as the new airport would be a safety hazard to the existing one. It seems not unreasonable to assume that this court would probably also uphold a height ordinance as a proper exercise of the "police power" upon the theory that such an ordinance is necessary to insure the safety of the general public.

The validity of airport "police power" zoning ordinances is doubtful. California, Idaho, Indiana, Maryland and New Jersey courts have decided that these ordinances represent an unconstitutional "taking" of property without due process of law. Florida and Alabama are the only states which have upheld the validity of such regulations. Kentucky will uphold the validity of these ordinances only if they do not interfere with property rights acquired prior to the promulgation of regulations under the Federal Aviation Act of 1958. The status of these ordinances in Vermont and Massachusetts is unclear, although it appears that these courts would probably consider them constitutional. In spite of the fact that most courts that have considered the problem have found the ordinances unconstitutional, several commentators have concluded that the "police power" can be utilized to restrict the height of structures located on property adjoining an airport.[71] However, even the commentators that would sustain airport zoning would not apply it retroactively.[72] Until

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[66] *Id.* at 270.

[67] *Id.*

[68] 223 Minn. 175, 25 N.W.2d 718 (1947).

[69] 223 Minn. at 194, 25 N.W.2d at 730.

[70] *Id.*

[71] In summary it might be said that zoning of areas adjacent to airports which are devoted to a public use is a reasonable exercise of the police power of state and local government. Federal, state and local policy supports such zoning. A study of applicable legal principles leads one to the conclusion that the courts will uphold reasonable airport zoning as police power regulation for the promotion and protection of the public safety, convenience and general welfare of the community. In addition, the courts can sustain airport zoning as a proper police power safety regulation without use of the community benefit principle which supports all zoning.

C. RHYNE, MUNICIPAL LAW § 22-22, at 491-92 (1957). *Accord*, FIXEL, THE LAW OF AVIATION, at 561 (4th ed. 1967); Hunter, *The Conflicting Interests of Airport Owner and Nearby Property Owner*, 11 LAW & CONTEMP. PROB. 539, 552 (1946); *Airport Zoning as a Height Restriction*, 13 HAST. L.J. 397 (1962).

[72] C. RHYNE, *supra* note 71, at 491. There is strong support in the field of comprehensive zoning for retroactive effect being given to ordinances which require the removal of structures which are a public nuisance. *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915) (ordinance excluding brick kilns from residential districts enforced against existing kilns); People v. Kasbec, 257 App. Div. 941, 13 N.Y.S.2d 104 (1939) (ordinance prohibiting parking lots in business districts applied to existing parking lot). It still appears, however, that substantial, existing property rights cannot

the Supreme Court rules on the validity of such zoning ordinances, their status will remain in doubt. Based upon past performance, it seems unlikely that the Court will hear such cases, for there is usually an independent and adequate state ground for the decision.[73]

If the Supreme Court should eventually consider the constitutionality of airport zoning ordinances, it is submitted that the correct legal result and the most equitable adjustment of the rights and interests of the landowners and municipalities is to hold that the ordinances are an unconstitutional "taking" of property without just compensation.[74] Admittedly, the distinctions between a taking for which compensation must be made and a taking by regulation under the "police power," are largely distinctions in degree. However, courts have often made the distinction on the basis of whether the governmental action destroyed the property rights, or "took" the property rights from the owner and conferred them upon the public for its use. If the ordinance had the effect of destroying property rights in order to benefit the general health, safety and welfare, then it is an appropriate exercise of the "police power."[75] When, however, the effect of an ordinance is to transfer the property rights from the individual to the government instrumentality, it is not appropriate to utilize the "police power."[76] In the latter situation, it is incumbent upon the municipality or state to initiate proper condemnation proceedings. An airport zoning ordinance, although purporting only to regulate the use of private property near airports, is in effect a transfer of property rights—an air easement—from the owner to the government. It is submitted that such an ordinance is a "taking" of property without due process of law within the meaning of the Fourteenth Amendment. The words of Justice Holmes in the landmark case, *Pennsylvania Coal Co. v. Mahon*[77] are particularly instructive: ". . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change . . . ."[78]

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be destroyed by applying zoning ordinances retroactively. A. RATHKOPF, THE LAW OF ZONING AND PLANNING, ch. 58, 31 (3d ed. 1966).

[73] See notes 51 and 52 *supra*.

[74] *Accord*, Comment, *Constitutionality of a Zoning Regulation Requiring Landowners Abutting An Airport Not To Build Beyond a Certain Height Without Compensation*, 23 TEX. L. REV. 57 (1945).

[75] Ackerman v. Port of Seattle, 55 Wash. 2d 400, 408, 348 P.2d 664, 668 (1960). Also, see State *ex rel.* Miller v. Cain, 40 Wash. 2d 216, 242 P.2d 505 (1952).

[76] 55 Wash. 2d at 408, 348 P.2d at 668; *See generally*, Conger v. Pierce County, 116 Wash. 27, 198 P. 377 (1921).

[77] 260 U.S. 393 (1922).

[78] *Id.* at 415-16.

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Railway Labor Act — Union Discrimination — Proper Remedy

Plaintiff was a member of the defendant union, International Association of Machinists (IAM), from 1951 until May 1956, when his employer, Trans World Airlines (TWA), also a defendant, discharged him at IAM's insistance. Protesting the propriety of a 25 cent per month increase in the IAM dues, the plaintiff had refused to pay the dues requested for December 1955, and January, February and March 1956. During this four-month period, considerable confusion arose between plaintiff and IAM concerning the interpretation of the union constitution and IAM's collective bargaining agreement with TWA, resulting in IAM's rejection of plaintiff's tender of dues and a request by the union that plaintiff pay a reinstatement fee. Finally, IAM certified plaintiff's discharge under section 2, Eleventh of the Railway Labor Act (RLA).[1] Plaintiff brought an appeal to the system board of adjustment established pursuant to the RLA.[2] The board affirmed his discharge. On 22 April 1957, plaintiff commenced a civil action against both TWA and IAM in the Delaware Federal District Court praying for reinstatement and back pay. Six years later, the district court entered judgment directing Brady's reinstatement as well as restoration of his union membership, and awarded him over $10,000 in back pay and retirement benefits. All parties appealed.[3] *Held, affirmed*: A Railway Labor Act system board of adjustment does not have jurisdiction over a union-security discharge where it can be established that the union violated its duty to represent fairly the interests of an employee, and an employer discharging an employee as a result of this violation is liable even though intent to discriminate is not shown. *Brady v. Trans World Airlines*, 401 F.2d 87 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969).

Section 204[4] of the RLA requires that air carriers and unions which are subject to the Act provide in collective bargaining agreements for the creation of adjustment boards to resolve disputes not disposed of at any earlier stage in the grievance procedure. These boards are usually designed to give both union and management equal representation.[5] In general, adjustment board decisions involve questions dealing with interpretation

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[1] Railway Labor Act § 2, Eleventh, 64 Stat. 1238, 45 U.S.C. § 152 (1964).

[2] The system board was established under the Railway Labor Act §§ 1-208, 44 Stat. 577 (1926), *as amended*, 48 Stat. 1186, 45 U.S.C. §§ 151-88 (1964).

[3] Grounds for Brady's appeal were 1) lack of a jury trial of the fact issues, and 2) inadequacy of the award through the failure of the District Court to find hostile discrimination. 401 F.2d at 105.

[4] Railway Labor Act § 204, 49 Stat. 1189, 45 U.S.C. § 184 (1964). For a good general discussion of adjustment boards, *see* 35 J. AIR L. & COM. 112 (1969).

[5] The TWA-IAM agreement provides (Article XII(b)):

> The System Board of Adjustment shall consist of four (4) members, two (2) shall be selected by the Company and two (2) by the Union. 401 F.2d n.13.

of the basic collective bargaining agreement.[6] If the boards function properly by conforming to due process requirements, decisions made by adjustment boards are final and binding on the parties[7] not only because section 3, First[8] so provides, but also because the parties agreed to be bound when they negotiate their contract. It should be noted that court review of adjustment board decisions is possible to determine whether the board had an adequate jurisdictional base on which to make a decision;[9] however, courts are reluctant to interfere with the operation of these "industrial tribunals" in the interest of permitting management and unions to work out solutions to their problems.[10]

Even though an adjustment board is provided for under the RLA, there are actually two alternatives available to an employee who feels that his discharge was unlawful within the terms of the agreement: (1) If he wishes to retain his employment, he can pursue his remedy under the administrative procedures established by the collective bargaining agreement, *i.e.*, appeal to the system board; or (2) if he accepts his discharge as final, he can bring an appropriate action at law for breach of the bargaining agreement and seek money damages.[11] The right to an administrative remedy is statutory and guaranteed by federal law;[12] the action at law is a common law right broadly recognized by the Supreme Court in *Moore v. Illinois Central Railroad Co.*[13] as supplementary to the statutory right. Later decisions by the Court limited and more clearly delineated the non-statutory remedy, requiring that the suit apply only to discharge cases,[14] that no administrative appeal be in process at the time of the common law action[15] and that compliance with any local procedural prerequisites prior to the commencement of an action be shown.[16] These, and similar limitations, reflect the general judicial attitude that an employee has not complied with the spirit of the RLA until he has utilized the grievance and appeal procedures created in the contract.[17] However, it has been recognized that where the plaintiff can show adequate reason for failure to exhaust statutory remedies, the court will ignore this requisite

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[6] *E.g.*, S. COHEN, LABOR LAW 140 (1964); Aaxico Airlines, Inc. v. ALPA, 358 F.2d 433 (5th Cir. 1966); Crusen v. United Air Lines, 141 F. Supp. 347 (D. Colo. 1956).

[7] Railway Labor Act § 3, First(m), 44 Stat. 578 (1926), *as amended*, 80 Stat. 208, 45 U.S.C. § 153 (1964). *E.g.*, Gunther v. San Diego A. E. Ry., 382 U.S. 257 (1965); International Ass'n of Machinists v. Central Airlines, Inc., 372 U.S. 682 (1963); Elgin, J. & E. Ry. Co. v. Burley, 325 U.S. 711 (1945); Finlin v. Pennsylvania R.R., 288 F.2d 826 (3d Cir. 1961); Wooley v. Eastern Air Lines, 250 F.2d 86 (5th Cir. 1957), *cert. denied*, 356 U.S. 931 (1958); Sigfred v. Pan American World Airways, 230 F.2d 13 (5th Cir.), *cert. denied*, 351 U.S. 925 (1956).

[8] Railway Labor Act § 3, Second, 44 Stat. 578 (1926), *as amended*, 80 Stat. 208, 45 U.S.C. § 153 (1964).

[9] 28 U.S.C. §§ 1331, 1337 (1964).

[10] *See generally* LABOR STUDY GROUP, THE PUBLIC INTEREST IN NATIONAL LABOR POLICY 32 (1961).

[11] Walker v. Southern Ry., 385 U.S. 196 (1966).

[12] Railway Labor Act § 204, 49 Stat. 1189, 45 U.S.C. § 184 (1964).

[13] 312 U.S. 630 (1941).

[14] Slocum v. Delaware L. & W. R.R., 339 U.S. 239 (1950).

[15] Transcontinental & Western Air, Inc. v. Koppal, 345 U.S. 653 (1953).

[16] *Id.*

[17] *Infra* note 22. *See also* Bhd. of Locomotive Eng'rs v. Lewisville & Nashville R.R., 373 U.S. 33 (1963); Bhd. of R.R. Trainmen v. Chi. R. & Indiana R.R., 353 U.S. 30 (1957).

and permit the case to be heard.[18] The initial recourse to the internal contract procedures is likewise waived by the courts if it is clear that the plaintiff no longer is seeking reinstatement and treats his discharge as a complete breach of contract.[19] Under these circumstances he is suing "externally"and is not considered subject to the RLA.

Apart from the question of an unlawful breach of contract is the problem of discharge occasioned by an act of union discrimination in the treatment of the employee, committed purposefully and with hostility. A grievant making a claim under an act of discrimination asserts a violation of the duty of fair representation which a union owes to all the employees it represents. This duty, implicit in the RLA,[20] requires a litigant to show that the union acted with malice and bad faith.[21] The seriousness of such a charge has led the courts to insist that unions be given an opportunity to resolve any allegations of discrimination prior to court action; hence, the general rule is that the union member must first exhaust internal union remedies as set forth in his part with the union (usually the union constitution) before he can bring a law suit, or show adequate reason for failing to do so.[22]

The fair representation concept underlies section 2, Fourth of the RLA.[23] Favoritism in dealing with employees is explicitly prohibited by this section and applies to both management and the union. Although the idea of impartial treatment of all employees is the cornerstone of the RLA, section 2, Eleventh creates an exception to section 2, Fourth by permitting a limited form of discrimination through the union shop:

> Notwithstanding any other provisions of this Act . . . any carrier or carriers . . . and a labor organization or labor organizations . . . shall be permitted (a) to make agreements, requiring, as a condition of employment, that within sixty days following the beginning of such employment . . . all employees shall become members of the labor organization representing their craft or class.[24]

Under section 2, Eleventh the union and management exert pressure encouraging union membership, securing to the union a forced membership of all employees working for the carrier for a period in excess of 60 days.

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[18] *E.g.*, Foy v. Norfolk & W. R.R., 377 F.2d 243, 246 (4th Cir. 1967); Neal v. System Bd. of Adj., 348 F.2d 722 (8th Cir. 1965).

[19] Walker v. Southern Ry., 385 U.S. 196 (1966).

[20] Conley v. Gibson, 355 U.S. 41 (1957); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Elgin, J. & E. Ry. v Burley, 325 U.S. 711 (1945); Tunstall v. Bhd. of Locomotive Firemen, 323 U.S. 210 (1944); Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944).

[21] Vaca v. Sipes, 386 U.S. 171 (1967); Humphrey v. Moore, 375 U.S. 335 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Cunningham v. Erie R.R., 266 F.2d 411, 417 (2d Cir. 1959). With respect to payment of union dues, *see especially*, Special Machine & Engineering Co., 109 N.L.R.B. 838, 839 (1954); North American Refractories Co., 100 N.L.R.B. 1151, 1155 (1952).

[22] *E.g.*, Gainey v. Bhd. of Ry. & Steamship Clerks, 275 F.2d 342, 345 (3d Cir.), *cert. denied*, 363 U.S. 811 (1960). *See also* the Bill of Rights of the Members of Labor Organizations:

> *Provided*, that any such member may be required to exhaust reasonable hearing procedures . . . before instituting legal or administrative proceedings against such organizations . . . . 29 U.S.C. § 411(a)(4).

[23] Railway Labor Act § 2, Fourth, 44 Stat. 577 (1926), *as amended*, 48 Stat. 1186, 45 U.S.C. § 152 (1964).

[24] Railway Labor Act § 2, Eleventh, 64 Stat. 1238, 45 U.S.C. § 152 (1964).

The clause of the collective bargaining agreement containing these provisions is called the "union security" clause and usually provides that discharge can be ordered for failure to pay dues or initiation fees.[25]

If, under a union security clause, discharge is certified by the union and later found to be unlawful, a question arises as to the liability of the air carrier to the employee for the wrongful discharge. The carrier discharges the employee as it must do when a certification is received if it is to comply with the collective bargaining agreement; yet, as is often the case, the air carrier has no intent to discriminate through a wrongful discharge, and is unaware of the union act of unfair representation. Cases under the National Labor Relations Act (NLRA)[26] hold that an employer who, in good faith, relies upon a union discharge certification is not "automatically" liable to an employee where the union's certification is wrongful; only where the employer has reasonable grounds for believing that the certification is improper may the employer be held liable jointly with the union.[27] Under the RLA, there is no provision for "automatic" liability; nor does the legislative history of section 2, Eleventh indicate that Congress intended railroad and airline employers to be liable automatically for union dereliction under the RLA, while allowing employers under the NLRA to escape such a strict rule.[28] However, cases arising under the RLA indicate that a duty of strict accountability may be imposed on an innocent employer. The Court of Appeals for the Fifth Circuit has stated:

> It takes two parties to reach an agreement, and both have a legal obligation not to make or enforce an agreement or discriminatory employment practice which they either know, *or should know*, is unlawful . . . [W]e think the [union's] obligation under this statute does not exist *in vacuo*, unsupported by any commensurate duty on the part of the carrier [Emphasis added.].[29]

Similarly, the Second Circuit has said:

> Once it is established, as here, that the expulsion of the worker from membership in the union was the product of an act of "hostile discrimination" by the union, that is to say, "for any reason other than the failure of the employee to tender the periodic dues . . . *uniformly required* as a condition of acquiring or retaining membership . . . the Railroad, having discharged the employee on the representation of the union that he had failed to tender such periodic dues . . . is automatically liable for wrongful discharge. . . .

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[25] Article XXVI of the TWA-IAM agreement provides:
> (a) Each employee . . . shall . . . become a member of . . . the Union . . . . (M)embership in good standing in the Union shall consist of the payment by the employee of dues . . . uniformly required of his classification . . . (Sec. 14) Delinquency . . . shall automatically cancel membership and all rights, privileges and benefits . . . .

[26] National Labor Relations Act, 49 Stat. 449 (1935), *as amended*, 29 U.S.C. §§ 151-87 (1964).

[27] International Bhd. of Elec. Workers v. NLRB, 379 U.S. 819 (1964); NLRB v. The Leece-Neville Company, 330 F.2d 242 (6th Cir.), *cert. denied*, 399 U.S. 819 (1964); Producers Transport v. NLRB, 284 F.2d 438, 443 (7th Cir. 1960); NLRB v. Allied Independent Union, CUA, 238 F.2d 120 (7th Cir. 1956); NLRB v. Pape Broadcasting Co., 217 F.2d 197 (5th Cir. 1954); Kranbo Food Stores, Inc., 114 N.L.R.B. 241, 244 (1955).

[28] 401 F.2d at 100. *See* 1950 U.S. CODE CONG. SERVICE 4319.

[29] Richardson v. Texas & New Orleans R.R., 242 F.2d 230, 236 (5th Cir. 1957).

> This is because the limited protection afforded by the Railway Labor Act is no longer available as a defense.[30]

In *Brady*, the Court of Appeals for the Third Circuit upheld the district court decision and reasoning in almost every particular. It found, first, that the district court had jurisdiction to hear the dispute and, second, that the award was proper. Citing section 204 of the RLA, the court reasoned that the system board could not rule on the plaintiff's complaint, since it did not have jurisdiction to decide issues between employees and their union. The court reasoned that *Conley v. Gibson*,[31] a Supreme Court decision, held that:

> . . . Section 3, First by its own terms applies only to "disputes between an employee or group of employees and a carrier or carriers." This case involves no dispute between employee and employer but to the contrary is a suit by employees against the bargaining agent to enforce their statutory right not to be unfairly discriminated against by it in bargaining. The Adjustment Board has no power . . . to protect them from such discrimination.[32]

The *Brady* court then went on to state that, "The RLA does not authorize adjustment boards to hear an employee's dispute against his union."[33] It is pointed out in the decision that membership in the system board is designed to give representation to the union and to management. The scheme of the Act anticipates that the union will fairly represent an employee before any tribunal adjudicating his rights; in circumstances such as these where the interests of IAM and the employee are in conflict, the union can hardly be expected to "vigorously and forthrightly" pursue its member's claim.[34]

IAM and TWA claimed that the decision in *Bower v. Eastern Airline*,[35] decided by the Third Circuit, required a contrary result. The *Bower* case was a typical holding that an employee must "take his medicine" and abide by a system board decision if he chooses to utilize administrative procedures under the Act. The defendants urged that this decision precluded judicial review of the system board decision. The *Brady* court pointed out that *Bower* did not foreclose federal courts from considering questions of essential fairness or jurisdiction, and reiterated that the system board lacked jurisdiction to hear the case. Federal jurisdiction was found in the obligation of the court to enforce the RLA.

The *Brady* court quickly disposed of the question of the liability of TWA by citing its own decision in *Cunningham v. Erie R.R.*:

> If the District Court has jurisdiction to proceed against the union it is clear, we think, that it has also the power to adjudicate the claim against the [carrier]. It would be absurd to require this closely integrated dispute to be cut up into segments.[36]

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[30] Cunningham v. Erie R.R., 358 F.2d 640, 645 (2d Cir. 1966). *See* Note, 76 YALE L.J. 210 (1966).
[31] 355 U.S. 41 (1957).
[32] *Id.* at 44-5.
[33] 401 F.2d at 93.
[34] *Id.*
[35] 214 F.2d 623 (3d Cir.), *cert. denied*, 348 U.S. 871 (1954).
[36] 266 F.2d 411, 416 (2d Cir. 1959).

However, the court provided an interesting supplemental argument for holding TWA liable for the wrongful discharge. In finding that there was jurisdiction over the dispute, the district court interpreted the plaintiff's complaint as alleging a violation of section 2, Eleventh of the RLA. As indicated above, section 2, Eleventh is a statutory exception to the anti-influence requirement of section 2, Fourth; and the violation of section 2, Eleventh makes the parties subject to section 2, Fourth. In falling outside of the protection of section 2, Eleventh, IAM and TWA were both guilty of "influencing . . . employees in an effort to make them remain . . . members of [a] labor organization."[37] The jurisdiction of the court to hear complaints alleging violations of section 2, Fourth is clear; hence, reasoned the court, its jurisdiction to hear suits involving section 2, Eleventh—the proviso to section 2, Fourth—must also be clear. To rule otherwise would be to find that the congressional intent was to have challenged parties placed in a position to determine their own responsibility. In the words of the court:

> Otherwise, in such a dispute, which pits an employee against his union and his employer, the very parties whose power he challenged would have the additional power of deciding whether they had exercised it in a proper manner.[38]

The court saw no need in assigning responsibility under section 2, Fourth for TWA to have known that it was discriminating against Brady by discharging him under a certification later found to be unlawful; it rejected the TWA argument that an employer does not violate section 2, Fourth unless he has "reasonable grounds for believing" that the union membership was terminated for reasons other than the tender of periodic dues uniformly requested. According to the court: To adopt TWA's view would require that the court read the intent standard of section 8(a)(3) of the NLRA[39] into section 2, Fourth and Eleventh where no such standard was supplied by Congress. The *Cunningham* decision was quoted as authority for this holding of automatic liability, the court noting that there is an industry practice of providing that carriers be indemnified by errant unions for all liability arising from an unlawful union security discharge.

In addition, the court felt a case could be built against TWA following the reasoning in *Radio Officers' Union v. NLRB*.[40] The latter case did not involve a discharge certified for the failure to pay union dues; however, the court felt that the conclusion reached by the Supreme Court was applicable to TWA:

> [I]t is also clear that specific evidence of intent to encourage or discourage (union membership) is not an indispensible element of proof of violation of section 8 (a)(3). . . . This recognition that specific proof of

[37] Railway Labor Act § 2, Fourth, 44 Stat. 577 (1926), *as amended*, 48 Stat. 1186, 45 U.S.C. § 152 (1964).

[38] 401 F.2d at 96.

[39] National Labor Relations Act § 8(a)(3), 49 Stat. 449 (1935), *as amended*, 29 U.S.C. § 158 (1964).

[40] 347 U.S. 17 (1954).

> intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common law rule that a man is held to intend the foreseeable consequences of his conduct. . . . Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. *Concluding that encouragement or discouragement will result, it is presumed that he intended such consequences.* . . [Emphasis added.].[41]

A discharge under a union security agreement, then, inherently encourages other employees to comply promptly with union membership requirements; if such a discharge is unlawful, it will be presumed that the employer intended the forseeable consequence of his act, *i.e.*, the encouragement of union membership.

After finding TWA liable under section 2, Eleventh the court found IAM liable under section 2, Fourth by reasoning that, since section 2, Eleventh referred to both union and employer, section 2, Fourth must have contemplated the union as a party to the discrimination practiced against the plaintiff. This, said the court, is no more than rational, since the union is the source in this instance of the illegal application of section 2, Eleventh.

The claim by the plaintiff that IAM hostilely discriminated against him was dismissed by the court for his failure to exhaust internal union remedies. Unlike the district court, which stated that this claim was moot in light of its decision regarding the discrimination claim,[42] the Court of Appeals held that a hostile discrimination claim has traditionally been dismissed where the plaintiff has not exhausted internal remedies; such procedure insures that the union be given a chance to correct the discrimination in its own way. The court did not preclude the possibility of these claims being valid in future actions, for "it is conceivable that an award of damages by a court against a union for hostile discrimination could supplement the relief available for a violation of sections 2, Fourth, Eleventh."

The Third Circuit opinion in the *Brady* case is well reasoned and gives ample support for the conclusions made and the award granted. Yet, after more than eleven years of litigation,[43] the benefit of reinstatement to the plaintiff seems remote; on deposition, Brady stated, "I think if I go back to TWA there would be further trouble, and I think if I am financially independent and that I don't have to worry about a job in my condition and so forth, I think I would just say the heck with the job."[44] Likewise, the court decision seems to penalize the defendant that was admittedly guilty of no wrong doing, and permit the party guilty of discrimination under the RLA to escape liability. The cost to TWA of honoring the

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[41] *Id.* at 44-5.

[42] 223 F. Supp. 361, 370 (D. Del. 1963).

[43] For the chronological history of this suit, *see* 156 F. Supp. 82 (D. Del. 1957); 167 F. Supp. 469 (1958); 174 F. Supp. 360 (1959); 196 F. Supp. 504 (1961); 223 F. Supp. 361 (1963); 244 F. Supp. 820 (1965); Civil No. 1884 (D. Del., filed 6 Sept. 1966).

[44] Deposition taken of plaintiff on 7 September 1960, Joint Appendix filed with the United States Court of Appeals for the Third Circuit, Nos. 16, 266-8 at 261a.

wrongful IAM certification is high—over a decade of legal expense, more than $10,000 in back pay, reinstatement expenditures for updating plaintiff's share in TWA's retirement plan, and an expensive retraining program that will be necessary to place the plaintiff back in his job as an airline mechanic.[45] IAM, on the other hand, is required simply to reinstate the plaintiff to membership in the union. While TWA may have a right of indemnification for the losses it sustains under contract provisions with IAM, less fortunate employers would be forced to bear awards from unlawful certifications without remuneration from the transgressor union. In short, the result reached by the Third Circuit seemed to satisfy no one, and but for the plaintiff's tenacity and insistance for his day in court, this conflict might have been settled by the litigants long ago. Clearly, court process is a slow and inadequate way to handle the security discharge case and the need for a more expeditious and satisfying solution to the problem is indicated.

K. Mark Pistorius

[45] 401 F.2d 87 (1968). *See also* Civil No. 1884 (D. Del., filed 6 Sept. 1966).

Federal Tort Claims Act — Servicemen — Exclusion

An aircraft, operated by Military Air Transport Service (United States Air Force), crashed on 25 June 1965 near Santa Ana, California, shortly after departure from the Marine Air Station at El Toro, California. Marine Sergeant James E. Lee, a passenger aboard the plane under military orders, was killed in the crash. His survivors brought suit under the Federal Tort Claims Act[1] against the United States Government, alleging negligence of the Federal Aviation Agency's[2] employees in their control of the plane's departure. The Government, in defense, moved that the complaint be dismissed under Rule 12(b) of the Federal Rules of Civil Procedure,[3] the contention being that a soldier could not bring suit against the United States while on active duty with the armed forces. The trial court denied the motion and filed an opinion. After denying a subsequent motion for reconsideration, the trial court certified that its denial involved a controlling question of law.[4] The appellate court then granted an interlocutory appeal.[5] *Held, reversed*: A serviceman on active duty may not bring suit against the United States; his acts are incidental to military service. *United States of America v. Lee*, 261 F. Supp. 252 (C.D. Cal. 1966), 400 F.2d 558 (9th Cir. 1968), *cert. denied*, 393 U.S. 1053 (1969).

The deceased's survivors sought recovery under the Federal Tort Claims Act (hereinafter FTCA or Act), a statute permitting certain suits against the United States. Prior to this enactment, the United States possessed complete immunity from the tortious acts of its agents by reason of its sovereign status.[6] Under the Act, however, liability is imposed upon the United States for the negligence of its employees, provided that the employee is acting within the scope of his employment when the tort is committed, and that the employee would be liable for his actions if he occupied the status of a private individual.[7] However, governmental immunity was retained in several instances, the most significant being when a governmental official acts in a discretionary, as distinguished from an operational capacity.[8] The only specific exceptions in the Act, relating to

[1] 28 U.S.C. § 1346 (1964).

[2] The Federal Aviation Agency is now the Federal Aviation Administration of the Department of Transportation. Department of Transportation Act § 3, 80 Stat. 931, 49 U.S.C. § 1651 (1966).

[3] This rule provides for a motion to dismiss based upon lack of jurisdiction over the subject matter or failure to state a claim upon which relief may be granted.

[4] 28 U.S.C. § 1292 (1964), permits an interlocutory appeal if the trial judge certifies that the order involves a controlling question of law. The court of appeals may then, in its discretion, permit the appeal.

[5] *Id.*

[6] W. PROSSER, LAW OF TORTS § 125 (3d ed. 1964).

[7] 28 U.S.C. § 1346 (1964).

[8] 28 U.S.C. § 2680(b); *See*, Dalehite v. United States, 346 U.S. 15 (1953) for a discussion of those governmental functions which occur at the operational level. The purpose of this distinction is to preserve governmental immunity at the planning or policy level stages while day-to-day operations of the government are subject to suit under the Act.

servicemen, are that the United States retains its immunity in claims arising out of combat activities[9] and those claims arising on foreign soil.[10] Nowhere in its list of specific exceptions does the Act deny recovery to a serviceman for the sole reason that he is on active duty when he sustains the injury.

Lee, in reaching its conclusion that as a matter of statutory interpretation, the Act precludes claims by servicemen on active duty, relied on *Feres v. United States*,[11] a landmark Supreme Court decision which first announced this implied exception to the Act. In so doing, the appellate court in *Lee* overruled the district court's opinion which had found the *Feres* doctrine conclusively outworn due to subsequent Supreme Court decisions.[12] Determination of the validity of *Lee* on the appellate level thus necessitates a careful analysis of its foundation—the *Feres* doctrine and the effect of subsequent Supreme Court decisions upon that doctrine.

Feres v. United States involved three attempts by soldiers injured while on active duty, to recover under the FTCA: (1) Feres, on active duty, died in a fire in unsafe barracks caused by a defective heating unit; (2) Jefferson submitted to an abdominal operation while on active duty. Subsequent to his discharge, he underwent a second operation in which a towel was removed from his stomach, apparently a result of the negligence of an army surgeon during the first operation; (3) Griggs, while on active duty met his death at the hands of a negligent and unskillful army surgeon. The Supreme Court denied recovery, holding that a soldier on active duty who sustained any injury because of the negligence of another in the armed forces, could not recover under the FTCA, as the injury arose "in the course of activity incident to service."[13] The Court, thus read an implied exception into the Act.

The Court, in *Feres*, first reasoned that the purpose of the FTCA was to provide a remedy for those who had theretofore been without relief; consequently, if some form of federal relief was available to a class of individuals before passage of the Act, Congress could not have intended for those individuals to have the benefit of its enactment. Accordingly, the Court deduced that military personnel were not included within the Act because the military had its own exclusive remedy in the form of various benefits for injuries sustained. Any recovery under the FTCA for the military would be in addition to available military benefits, and would constitute a "double recovery," thereby frustrating congressional intent. The reason that this implied exception was not specifically enumerated in the statute was due to congressional oversight, the Court concluded.[14]

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[9] 28 U.S.C. § 2680(j) (1964).

[10] 28 U.S.C. § 2680(k) (1964).

[11] 340 U.S. 134 (1950).

[12] The district court opinion Ardell Lee v. United States is found at 261 F. Supp. 252 (C.D. Cal. 1966).

[13] 340 U.S. at 146.

[14] The Court's argument in denying recovery, based on the theory that additional compensation excludes the serviceman's recovery, is found at 340 U.S. 140. Prior to its *Feres* decision, in Brooks v. United States, 337 U.S. 49 (1949), the Court allowed recovery to a soldier injured while on

Nevertheless, in *United States v. Brown*,[15] the Supreme Court held that a discharged veteran, who was injured in a Veterans Administration hospital, could recover under the FTCA. The Government, in its defense, relied on the *Feres* theory that a recovery under the Act would be a "double recovery," since the veteran could receive compensation under the Veterans Administration Act. However, the Court reasoned that no double recovery would result; rather, the injured party would be required to mitigate the damages recovered in his FTCA award by the amount he had collected from other sources. Although *Feres* and *Brown* may be factually distinguished, such distinctions are irrelevant. The real significance lies in the fact that a military employee of the Government was granted recovery under the FTCA despite the fact that he had other forms of compensation available to him.[16] In both cases, servicemen on active duty and those not on active duty were awarded non-FTCA benefits for injuries received. Moreover, these additional benefits mitigated FTCA damages, thereby precluding the possibility of a "windfall" at governmental expenses.[17] Thus the *Brown* opinion undermined the *Feres* doctrine by eliminating the most persuasive element of the *Feres* opinion, the "double recovery" argument.[18]

To bolster its *Brown* rationale, the Supreme Court, in *United States v. Muniz*[19] allowed a federal prisoner to bring suit against the United States, stating that additional compensation would not preclude recovery under the FTCA. Again, the *Feres* theory was ignored since in both cases additional statutory compensation was within reach of the injured parties.[20] However, in a subsequent case, *United States v. Demko*, the Supreme Court declined to follow the *Brown* and *Muniz* opinions[21] and denied recovery to a federal prisoner because he received statutory compensation provided to injured federal inmates.[22] Thus, the inconsistency of the Court has confused the issue of whether recovery under a statute other than the FTCA bars its operation. The district court in *Lee*, relying on *Brown* and *Muniz*, recognized their inconsistency with *Feres* and considered them controlling,[23] thereby recognizing that the *Feres* theory had not been

furlough, the reason being that the injury did not arise in the course of active duty. In that case, the Court did not exclude recovery *even though* Brooks could receive additional compensation.

[15] 348 U.S. 110 (1954).

[16] In *Brown*, the Court relied on the distinguishing factor as being that Brown's injuries did not arise out of military duty. This distinction is valid only when considered in the context of disciplinary effects which are critically evaluated in subsequent pages. *Infra* p. 659.

[17] *Brown* first set forth the theory that additional benefits under non FTCA claims would mitigate any recovery under that act. 348 U.S. at 113.

[18] It must be kept in mind, at this stage in the *Feres* analysis, that this is only one theory out of several upon which the Court relied to support its doctrine. Thus, any erosive effect which may be shown at this stage must be viewed in the context that it is one of several ideas upon which the doctrine rests.

[19] 374 U.S. 150 (1962).

[20] The above statement must be qualified by the fact that soldier and prisoner find themselves in different relationships to their government and may be distinguished in this context. Keeping this qualification in mind, these seemingly inapposite relationships are indistinguishable when enclosed only by the theory of denying anyone compensation under the FTCA if he receives other statutory benefits, as both parties receive other statutory benefits.

[21] 385 U.S. 149 (1966).

[22] The non-FTCA statute allowing benefit was 18 U.S.C. § 4126 (1964).

[23] 261 F. Supp. at 255.

followed. The appellate court, however, re-endorsed the idea of "no second recovery," relying on *Feres* and *Demko* as the controlling rationale.[24] The opposite decisions reached by the lower court and its reviewing tribunal demonstrates an inconsistency demanding a re-evaluation and clarification of the effects of additional compensation as a bar to recovery under the FTCA.

Under such re-examination, the Supreme Court would be unjustified in accepting the theory that any type of non-FTCA statutory benefits renders the FTCA inapplicable. Irrespective of the factual background of each case,[25] the Act was passed to provide a remedy for those who had been without. Under the theory that any extra compensation received would mitigate damages under the FTCA, the fear that an injured party may recover more than the damages he sustained is dispelled. To disallow recovery on the "double recovery" theory would place the individual in an inferior status to the person who may recover only under the FTCA, since recovery of non-FTCA statutory benefits may be far less than the injured party's actual damages. Most significant, denial of an adequate recovery disregards the primary intent of the FTCA which is to provide adequate compensation to one who is negligently injured by governmental personnel.

Another possibility to consider is that if it is entirely inappropriate to allow FTCA recovery, mitigated by other federal compensation, there is the available option to allow the injured party to elect either non-FTCA compensation or compensation under the Act.[26] Thus, the injured party would be compelled to consider whether his damages would be adequately covered under various military compensation statutes; if not, he could forego these statutes and recover exclusively under the FTCA.

As thus discussed, the above theories of "mitigation" or "election" effectively preclude any "windfall" to the serviceman. If the ultimate aim of the FTCA is to provide adequate compensation to an injured party, the idea of extra benefits may be effectively controlled in order to insure that the government pays no more than the damages the aggrieved suffers. Therefore, if in subsequent cases, the Supreme Court recognizes the true intent of the Act, this basis of *Feres* and *Demko* cannot be upheld. Thus, the first premise of *Feres* is questionable as to both its validity and its present status as controlling law.

The second foundation of *Feres* was that since the United States, under the FTCA, is liable in the same manner as a private person under like circumstances, the government could not be liable, as private persons do not maintain armies.[27] The district court in *Lee* considered this rational overruled by the Supreme Court in *Indian Towing Company v. United States*,[28] where the Court reasoned:

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[24] 400 F.2d at 562, 563.

[25] *Supra* notes 16 and 20.

[26] For a discussion on the possibility of such an election, *see* Hitch, *The Federal Tort Claims Act and Military Personnel*, 8 RUTGERS L. REV. 316, at 336 (1954).

[27] 340 U.S. at 141, 142.

[28] 350 U.S. 61 (1955).

> It is hard to think of any kind of governmental activity on the "operational level" which is uniquely governmental in the sense that its kind has not, at one time or another, or could not conceivably be privately performed.[29]

The Court, in *Indian Towing*, rationalized that the broad purpose of the Act was to compensate victims of negligent governmental activities if the government agent's acts were of the type that *could be* performed by a private individual. The Court in this case underwrote the theory that any activity, carried on at the operational level, could conceivably be performed by private individuals, and consequently, the Court restricted the scope of tort immunity under the FTCA. Prior to *Indian Towing*, the Court had retained governmental immunity for policy-making decisions of the government in *Dalehite v. United States*.[30] It recognized that the policy-making functions are so often uniquely governmental and discretionary that they could be performed only by a government agency.[31] Thus, the "discretionary" or "policy-making" level of government was defined in *Dalehite* as that higher stratum of authority which initiates policy and exercises a planning function in governmental activities.[32] Consequently, in accordance with the operational-discretionary test, the Supreme Court has ruled that the Air Traffic Control, a functionary branch of the Federal Aviation Administration,[33] in fulfilling its duties, acts in an "operational" function.[34] This fact was recognized by the district court in *Lee*,[35] and was utilized, accordingly, to reach the decision. The Ninth Circuit apparently acquiesed in the fact that the "purely private distinction" could no longer validly be applied to uphold the *Feres* doctrine,[36] as this theory has been dissipated in subsequent court decisions.

In its *Feres* decision, the third premise for justification was that since the FTCA applies the law of the place where the accident occured, it would be illogical to extend the Act to the soldier, as he has no choice of the place in which he finds himself.[37] To fortify this argument, it was also reasoned that the relationship between the armed forces and the serviceman is "distinctively federal" in character. There is, consequently, no federal law giving the soldier a cause of action against the military. Thus, the application of the Act to the soldier would discriminate against him by creating non-uniformity in the local laws that could apply to him.[38] This logic was undermined in *United States v. Muntz*[39] where the Court, in acknowledging that non-uniformity would result if a federal prisoner could sue under the Act, concluded that although non-uniformity of

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[29] *Id.* at 68.
[30] 346 U.S. 15.
[31] *Id.* at 15.
[32] *See* Dalehite v. United States, 346 U.S. 15 (1953), *supra* note 8.
[33] Department of Transportation Act § 3, 80 Stat. 931, 49 U.S.C. § 1651 (1966).
[34] The Air Traffic Control of the Federal Aviation Agency was first held to operate at the operational level in United States v. Union Trust Company, 221 F.2d 62 (D.C. Cir. 1955), *aff'd per curiam*, 350 U.S. 907 (1955).
[35] 261 F. Supp. at 255.
[36] The court of appeals did not discuss this aspect of *Feres* in its decision in *Lee*.
[37] 340 U.S. at 142, 143.
[38] *Id.* at 143.
[39] 374 U.S. 150.

application of local law under the Act may prejudice the injured party, a complete denial of recovery would result in an even greater prejudice.[40]

In addition, the Court in *Feres* reasoned that to allow a soldier to recover against the government would be novel and unprecedented.[41] Yet, the Court, in *Rayonier Inc. v. United States*,[42] subsequently stated:

> It may be said that it is "novel and unprecedented" to hold the United States accountable for negligence to its fire fighters, but the very purpose of the Tort Claims Act was to waive the Government's traditional, all-encompassing immunity from tort action and *to establish novel and unprecedented governmental liability* [emphasis added.].[43]

Thus, the Court, in decisions subsequent to *Feres*, has eliminated the fear that non-uniformity of law, coupled with the fear of novel and unprecedented actions, could bar recovery under the Act. Invalidating this theory destroys inconsistencies, as the serviceman not on active duty was never denied relief, even though non-uniformity of laws, as to these individuals, would also result.[44] The district court in *Lee* recognized this change in law,[45] while the Ninth Circuit ignored this particular aspect of the *Feres* doctrine.

Finally, the *Feres* doctrine was predicated on disciplinary needs of the armed forces. The Court, in a subsequent case explained *Feres* in the following manner: Because of the existing "peculiar and special relationship of soldier and superiors," allowing recovery would have detrimental effects on discipline and morale.[46] This argument requires close analysis, since it is the only basis of *Feres* which has not been questioned by subsequent court decisions; and thus it is the only firm basis left for the *Feres* doctrine. Moreover, the Supreme Court itself has realized that this disciplinary theory of the case is the most valid support of the decision. The Court has stated:

> *Feres* seems best explained by the "peculiar and special relationship of the soldier to superiors," the effect of the maintenance of suits on discipline and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty.[47]

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[40] *Id.*

[41] *See* 340 U.S. at 142. There the Court said of the Act: "Its effect is to waive immunity from recognized causes of action and not to visit the Government with novel and unprecedented liabilities."

[42] 352 U.S. 315 (1957).

[43] *Id.* at 319.

[44] Since the FTCA applies the local law of the place where the accident occurs, 28 U.S.C. § 1346 (1964), a soldier not on active duty (for example, a soldier on furlough as in Brooks v. United States, *supra* note 14) would have to recover under local laws which may vary and accordingly, prejudice one individual as against another being injured in a place where the local law would be more favorable.

[45] 261 F. Supp. at 255, 256.

[46] *See* Brown v. United States, 348 U.S. at 112, where the Court stated: "The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court [*Feres*] to read that Act as excluding claims of that character."

[47] The above language appeared in United States v. Muniz, 374 U.S. at 162.

However, the Supreme Court has never defined what is meant by the term "discipline," even though an in-depth analysis of this term is needed. Moreover, it would then be helpful for the Court to relate precisely how the need for discipline could be preserved only by denying recovery to any member of the armed forces on active duty. An attempt must be made, therefore, to define "discipline."

Discipline apparently exists in a broad context which is coterminous with the military establishment itself. Each member of the armed forces occupies a special and unique relationship to the military establishment. Because of this relationship, the military functions by delegating authority down a chain of command from the highest official to the enlisted personnel of lower status. This broad field of discipline is interwoven with discipline in the narrower context of an individual who is in a special relationship to his immediate superior. It is discipline at this level which substantially creates discipline in the broader context. As subsequent examination will reveal, if discipline at this important level, that of the soldier to his superior, is maintained, then the broad context of discipline, as related to the soldier and the entire military establishment is preserved. After defining discipline in the above manner, analysis must now be turned to the question of whether discipline may be preserved if a soldier is allowed to recover under the FTCA.

That the need for discipline in military activities is an essential element in the armed forces cannot be denied. Yet, at the opposite end of the scale, to deny an adequate recovery to a serviceman is an undesirable result. One need not attempt to decide which of these policy ideals is more important if there exists a way to maintain essential discipline, while, at the same time, allowing adequate compensation to one injured at the hands of a negligent tort-feasor. Therefore, any Supreme Court analysis should attempt to place both seemingly unreconcilable ideals in such perspective that they may coexist to an extent, without disharmonious friction.

To be sure, the present rule of disallowing recovery to anyone on active duty may ensure discipline, regardless of whether the tort was committed in a factual context which necessitated discipline. Yet, if this active duty distinction were overruled without qualification, it is doubtful whether the military need for discipline would be affected. There would be, however, several limitations on the aggrieved party's right to recovery, since the FTCA already specifically exempts not only claims arising from combatant activities,[48] but also those arising on foreign soil.[49] Moreover, claims arising out of "assault, battery, false imprisonment, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights" are specifically exempted from the Act.[50]

Another qualification, the most critical and difficult to define, is the specific exception that the government is not liable for the acts of an

[48] 28 U.S.C. § 2680(j) (1964).
[49] 28 U.S.C. § 2680(k) (1964).
[50] 28 U.S.C. § 2680(h) (1964).

employee exercising a discretionary function, regardless of whether that discretion was abused.[51] Thus, from the specific exceptions of the FTCA, as applied to the soldier, he can sue only if his claims arise out of non-combatant activities, occurring on American soil, and arising out of negligence of a tort-feasor acting within an "operational" function. However, if this test were applied, its effect on discipline would depend upon the definition the Court places on discretionary *versus* operational functions. Since *Dalehite* the Court has stated that the discretionary level involves those activities carried on at the planning or policy level.[52] Thus, unquestionably, applying this distinction to the military structure, to higher ranking officers who are involved in planning and policy-making, would result in governmental immunity. Trouble begins, however, when one attempts to predict how far down the chain of command, *i.e.*, from higher officer down the line to each lower officer, the official would retain "discretionary status." To illustrate, the United States was liable for negligent operation of a lighthouse in *Indian Towing* which was defectively operated under the direction of a Coast Guard officer.[53] As to the injured parties, who were civilians, the Coast Guard was carrying on the day-to-day operations of government and thus was in the context of the non-immune operational functions. Apparently, those higher ranking officers at the planning level are the only ones who retain discretionary status. Thus, any lower grade officer (who, incidentally, usually has more men, especially enlisted men, under his direct command) apparently acts at the operational level. To allow suit on injuries resulting from his negligence could plausibly affect the special relationship of discipline or morale between the officer and his subordinates.

Thus realizing that the specific exceptions of the Act do not retain the safeguards necessary to maintain discipline, the need for an implied exception read into the Act is readily seen. However, this statement does not eliminate the criticism of the present exception which was read into the Act by the Supreme Court and has been consistently followed.[54]

Therefore, the duty lies with the Court to define what is mean by discipline and to realize that not all acts of a soldier on active duty are a necessary concomitant to the effective maintenance of discipline. Undeniably any analysis along these lines would produce a sliding scale of variables concerning what kind of reasonable nexus exists between discipline and recovery under the FTCA. Yet, the tort system, itself, is based upon the

[51] *See* Dalehite v. United States, 346 U.S. 15 (1953), *supra* note 8.

[52] *Id.*

[53] 350 U.S. 61.

[54] *For example, see* Calloway v. Garber, 289 F.2d 171 (9th Cir. 1961) (a car, driven by a navy recruiter, struck a car driven by a soldier who was on active duty at the time); Preferred Insurance Co. v. United States, 222 F.2d 942 (9th Cir. 1955) (a military plane crashed into a trailor park and the property damaged was that of servicemen on active duty at the time); Van Sickel v. United States, 285 F.2d 87 (9th Cir. 1960) (a soldier died on the operating table due to the negligence of an army surgeon). In all of the above cases, recovery was denied solely because the soldier was on active duty at the time of the injury. In Van Sickel v. United States, *supra*, the court held that the decedant's wife could not recover, even though the California wrongful death statute, under which the action was brought was not derivative of whether the husband could have sued if he had lived. The court denied recovery if the husband were on active duty, regardless of what provision the local wrongful death statute contained.

balancing of conflicting interests and rights, a fact which courts are often quick to recognize. Whether denial of FTCA recovery by a soldier would inhibit discipline could be readily decided in many cases. For example, the appellate court in *Lee* stated:

> The considerations of discipline which in part underlie the *Feres* rule are strikingly present here . . . . Compare the three cases decided in *Feres*. The necessity of maintaining discipline while a soldier is asleep or on an operating table is far less clear than maintaining discipline among soldiers being transported for military service in military aircraft under control of military authorities.[55]

This rationale becomes superficial if one considers that in the three instances in *Feres*[56] and in *Lee*, itself, the need for discipline as to those individuals ended with their wrongful deaths. If a decedent's survivors had been allowed to recover under the FTCA for his wrongful death in the above cases, it is difficult to see how military discipline would have been affected. On the other hand, in some cases the need for discipline could be so great as to justify a denial of FTCA recovery. For example, if a serviceman were allowed to sue his superior because of negligent orders given, it is conceivable that discipline from superior to subordinate could be harmed, since this relationship is such a functional part of military discipline.

If the Court does explore the disciplinary relationship more in depth in future cases, and if the need for clarification and definition in this area is made clear, either Congress or the High Tribunal should present adequately defined and better reasoned standards as to the application of the FTCA to servicemen on active duty in order that those activities which are not a necessary concomitant to discipline do not preclude application of the FTCA.[57] To do so will more adequately compensate the injured serviceman. And if recovery is to be denied, a more precise and clear basis for so doing should be provided. Thus, the initial step in re-evaluating the "active duty" concept of *Feres* is for the Supreme Court to undertake an extensive analysis of the definition and realm of military discipline. In accordance with its analysis, it should scrutinize those acts occurring on active duty which bear no reasonable nexus to discipline, and erase those acts from the prohibition of the "active duty" implied exception to the FTCA.

James C. Floyd

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[55] 400 F.2d at 564.

[56] It should be remembered at this point that *Feres* concerned three separate cases.

[57] An argument posed by the Government and adhered to by the circuit court in *Lee*, 400 F.2d at 561, is that if the Supreme Court, in implying the presently discussed exception into the Act erred, then it is for Congress, not the Court to change the exception. This examination, however, does not examine the merits of whose duty it falls upon to change the exception; rather, the purpose of the analysis is to bring forth the doctrine as it first originated, then exploit the inconsistencies and apparent erosions that have appeared. As regards the matter of discipline, the intent of the examination is to expose the ambiguities that result in using the term as a basis for denial of recovery without analyzing more in detail the realm of discipline's veil over denial of recovery. Thus, the analysis does take a position that there is the definite duty of the Court, rather than that of Congress, to define and explore its term "discipline and morale" more closely in the context of barring recovery and as being a necessary concomitant to discipline, lest the term continue as a superficial storage bin into which is thrust, without well reasoned explanations, every case which concerns a serviceman injured on active duty.

Air Carriers — Intrastate Regulation — Limitations on Federal Jurisdiction

The Texas Aeronautical Commission (Commission) awarded a certificate of public convenience and necessity to Air Southwest (ASW), an intrastate carrier, to operate a commuter air service between the Texas cities of Dallas/Ft. Worth, Houston and San Antonio in competition with several interstate carriers. Air Southwest, emphasizing in its application the delays caused by the long interstate operations of the other airlines, proposed to offer faster, more efficient reservation service, lower fares, fewer flight cancellations and more flights arriving on time. It contended that its service would "stimulate" the air traffic between these Texas metropolitan centers. Braniff, Continental and Trans-Texas Airways (now Texas International), all interstate carriers, appealed to a Texas district court for an injunction to prevent issuance of the certificate by the Commission because of the absence of substantial evidence that there was a public necessity for the proposed service. In support of their position, the interstate carriers cited the large number of seats unsold on the present airlines during "peak" rush hours of commuter travel. The district court reversed the Commission's decision. Air Southwest and the State of Texas appealed the decision to the Texas Court of Civil Appeals. *Held, affirmed*: There is not substantial evidence to uphold the entry of the Commission's order concerning the need for additional service. The services to be offered by Air Southwest are available from existing airlines; the exclusive reliance on only four airplanes would make a superior on-time performance difficult to achieve, since the breakdown of only one airplane would seriously affect the performance of the airline. The evidence showing projected future growth is not sufficient to establish a *present* market with less than adequate service. *Texas Aeronautics Commission v. Braniff Airways, Inc.*, 439 S.W.2d 699 (Tex. Civ. App. 1969).

While early air transportation required long flights and high space utilization, improved technology and greater concentration of the population have made shorter routes profitable.[1] Thus, intrastate commercial aviation has increased substantially, bringing with it an increase in economic regulation by the states.[2] By 1961, eighteen states had begun to issue certificates of public convenience and necessity for intrastate common carriage by air,[3] and several states presently assert jurisdiction over the

[1] Barnes, *The Economic Role of Air Transportation*, 11 LAW & CONTEM. PROB. 431, 439 (1946). Nevertheless 85 percent of the federal subsidy goes to airlines providing local short-haul service. 1967 CAB ANN. REP. 45. *See generally*, Mathews, *Certificated Air Service at Smaller Communities—The Need for Service as a Determinant of Regulatory Policy*, 34 J. AIR L. & COM. 27 (1968).

[2] Shepherd, *State-Federal Economic Regulation of Commercial Aviation*, 47 TEX. L. REV. 275 (1969).

[3] Letter from Charles S. Murphy, Chairman of the Civil Aeronautics Board, to Congressman

intrastate operations of interstate air carriers.[4] Federal policy has encouraged this trend limiting the authority of the Civil Aeronautics Board (CAB) in regulating the local carrier. Unburdened by the obligations and restraints of CAB regulation, the local carrier may enjoy advantages in competition with the interstate carrier. The *Air Southwest* case[5] illustrates the economic and legal phenomena that encourage competition between interstate and intrastate air carriers and the potential effects of such competition on federal regulatory policy. This note will examine that policy in light of the economic factors which bring state and federal regulation into conflict.

The Federal Aviation Act of 1958[6] grants only limited authority to the CAB in economic regulation of purely intrastate carriers. While the Federal Aviation Act extends safety regulations over any operation "in" or which "directly" affects interstate commerce, the economic regulations are not explicity applied to operations which "affect" commerce but are not "in" it.[7] So long as the intrastate carrier does not "engage in" interstate air transportation by carrying mail or by transporting traffic other than mail moving in interstate commerce, it is not required to hold a federal certificate of public convenience and necessity to begin service.[8] Even when purely intrastate carriers compete with federally certified ones, the CAB does not attempt to assert control over the intrastate carrier.[9] The Board's jurisdiction over such carriers, operating only between points located in a single state, has been judicially upheld if the carrier partici-

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Harley Staggers, Chairman, House Committee of Interstate and Foreign Commerce, July 10, 1967, 113 CONG. REC. H8473 (daily ed. July 11, 1967).

[4] People v. Western, 42 Cal. 2d 621, 268 P.2d 723, *appeal dismissed*, 348 U.S. 859 (1954); Taylor, *Economic Regulation of Intrastate Carriers in California*, 41 CALIF. L. REV. 454 (1953).

[5] Texas Aeronautics Commission v. Braniff Airways, Inc., 439 S.W.2d 699 (Tex. Civ. App. 1969), sometimes referred to as the *Air Southwest* case. *Note*: This paper is premised on the assumption that a final decision has been rendered on the application of *Air Southwest*. This assumption may be premature since the Texas Supreme Court has accepted review of the decision. The appeal will be argued before the court on 26 November 1969. If the lower court decisions are reversed and the certificate is issued by the Supreme Court, the problems discussed in this paper will become more urgent. Whether or not reversal occurs in this case, the emerging economic and legal trends suggest that an intrastate carrier will eventually receive authorization to compete on the routes between the large Texas cities unless Congress preempts state authority to grant intrastate certificates. One of the most significant trends in this direction is the increasing size and expense of the large aircraft which help to maintain the "image" of the interstate carriers, but which cannot be operated efficiently and inexpensively on the short route. Further progress of this trend, if not already, will create a ready market for the local, inter-city carrier properly equipped to provide the most efficient and profitable service on these routes. 13 TEX. SUP. CT. J. 24 (18 October 1969); hearing granted on whether substantial evidence exists to uphold the Commission order. Since "substantial evidence" may not be very much evidence, reversal of the lower court is conceivable.

[6] See Federal Aviation Act of 1958, 72 Stat. 758, *as amended*, 74 Stat. 445, 49 U.S.C. § 1373 (1964).

[7] Sheppard, *supra* note 2. "In the domestic licensing field our jurisdiction extends only to common carrier operations which are "in" interstate air transportation. The statute defines interstate air transportation as (1) common carrier operations between states; (2) common carrier operations between points in the same state which involve carriage of interstate traffic or involve freight through the airspace outside the state; and (3) operations involving the transportation of mail," said the Honorable Robert T. Murphy, then Chairman Civil Aeronautics Board before the National Association of Regulatory Utility Commissioners, Chicago, Ill., 14 November 1968.

[8] Murphy, *supra* note 7; Sheppard, *supra* note 2; *see also* Turney, *Methods of Differentiating Interstate Transportation From Intrastate Transportation*, 6 GEO. WASH. L. REV. 553, 641-44 (1938).

[9] Murphy, *supra* note 7.

pates substantially in the carriage of traffic moving interstate[10] or if the carrier flies its aircraft over a place outside the state.[11] It also appears that joint fare arrangements between intrastate and interstate carriers covering flights to and from points outside the state will invite CAB regulation.[12]

The present CAB criteria in distinguishing interstate from intrastate carriers is whether the carrier transports more than a *de minimis* amount of interstate traffic.[13] Although there are indications that federal jurisdiction will not be sustained under present legislation unless participation in interstate commerce is substantial,[14] recent civil rights decisions expanding the breadth of the term "interstate commerce" make it clear that federal jurisdiction could be extended by congressional action to virtually all aspects of air transportation.[15] Since it is difficult to imagine air commerce of any significance that does not have a "substantial effect," even though an "indirect" one on interstate commerce, expansion of CAB authority would seem to be easily justified. It is possible, however, that Congress would hesitate to preempt the remainings vestiges of state authority over local air commerce. Expansion of CAB authority by Congress would involve several conflicting interests, such as: (1) State interest in regulation of its local affairs, (2) the conflicting economic interests of the various airlines and (3) the need for national uniformity in CAB regulation.

These interests are in serious conflict only if there is actual competition between CAB-regulated and intrastate carriers. Since the profitability of the intrastate carrier depends on its ability to exploit the competitive restraints imposed by CAB regulations, direct competition creates several problems: (1) The disruption of the federal program of balanced, controlled competition and (2) the impairment of existing carrier operations by diverting local traffic.[16] Moreover, since many interstate routes

[10] CAB v. Freidkin Aeronautics, Inc., 246 F.2d 173 (9th Cir. 1957); CAB v. Canadian Colonial Airways, 41 F. Supp. (S.D.N.Y. 1940). For a long time, Pacific Southwest Airways carried many passengers whose journey began or ended outside the state, but it finally agreed to a cease-and-desist order which barred such carriage. Western Air Lines v. PSA, CAB Order E-19655, 38 CAB Rep. 1120.

[11] Island Airways v. CAB, 352 F.2d 735 (196).

[12] CAB v. Freidkin Aeronautics, Inc., 246 F.2d 173, 176 (9th Cir. 1957). CAB v. Canadian Colonial Airways, Inc., 41 F. Supp. 1006 (S.D.N.Y. 1940); also consent decree entered 1941 CAB ANN. REP. 36. Inability to make such through-fare arrangements is a handicap to intrastate airlines.

[13] The Board has stated that "air transportation between two points wholly within the same state constitutes (interstate) air transportation if in those operations the carrier transports more than a de minimus volume of traffic moving as part of a continuous journey in interstate commerce." Application of Aspen Airways, Inc., C.A.B. Order No. E-18023 (Feb. 4, 1962).

[14] Sheppard, *supra* note 2, at 286.

[15] "In short, the determinative test of the exercise of power by Congress under the Commerce Clause is simply whether the activity sought to be regulated is 'commerce which concerns more than one state' and has a real and substantial relation to the national interest." Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); *See also* Daniel v. Paul, 395 U.S. 298 (1969); Katzenback v. McClung, 379 U.S. 294 (1964) (Ollie's Barbecue); Wickard v. Filburn, 317 U.S. 111 (1942); Sheppard, *supra* note 2, at 276; Ryan, *Economic Regulation of Air Commerce by the States*, 31 VA. L. REV. 479, 502 (1945).

[16] Sheppard, *supra* note 2, at 289; R. CAVES, AIR TRANSPORT AND ITS REGULATION 169 (1962). The Board has recognized the undesirable consequences that may follow the inauguration of service that duplicates that already offered by an existing carrier. In the development of local and feeder service, the Board has directed its attention to minimizing uneconomical competition between trunklines and local-service carriers. *See* Bonanza Air Lines, Inc.—TWA, Route Authorization Transfer,

depend on the revenues derived from local traffic moving between intermediate intrastate points, the state certified carriers could interfere with the inauguration of new interstate routes.[17] While the CAB utilizes the high profit routes between large metropolitan cities to provide revenue to help reduce federal subsidies and support unprofitable services on other routes,[18] these routes offer the most attractive opportunity for the aggressive intrastate carrier. The CAB has already recognized that the operation of one intrastate carrier has had an "adverse impact" upon a federally subsidized interstate carrier.[19] By reducing the profits of the CAB regulated carriers, long-range goals of the CAB become more difficult to achieve. Despite the problems, Robert Murphy, former chairman of the CAB, has said, "it does not appear that state authorizations for intrastate air carriers have had a substantially adverse effect upon the development of the federally regulated air transportation system."[20] The CAB has recognized that the assertion of federal jurisdiction over all state regulated air carriers may be undesirable because of the increased burden of compliance imposed on the intrastate carrier.[21] It seems probable that a single intrastate carrier would not cause the CAB to seek preemption of state regulation. However, if several large intrastate carriers were operating in various sections of the country in serious competition with interstate carriers, the disruption of CAB functions might make preemption necessary.

This problem is put into sharp focus when Pacific Southwest Airlines (PSA) is examined. The remarkable success which a purely intrastate airline can achieve while remaining free from federal regulation is clearly demonstrated by PSA.[22] Operating wholly between points in California, PSA has concentrated imaginative marketing technology and the advantages of state over federal regulation in the lucrative Los Angeles-San Francisco market.[23] In 1965, PSA flew 40 percent of the traffic over this busy route while maintaining an impressive profit margin in competition with several interstate carriers.[24] In fact, productivity of the entire market has improved under the "stimulation" of PSA's aggressive marketing, thus indirectly benefiting all carriers serving the route. The combination of low prices and convenient scheduling seems to have in-

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10 C.A.B. 893, 897 (1949); Zook, *The Certification of Local and Feeder Air Carriers*, 7 Sw. L.J. 185 (1953).

[17] Sheppard, *supra* note 2, at 289.

[18] *Id.*; "But in addition to route strengthening, the real key to subsidy improvement is tied to the load factor on existing flights as well as any newly authorized operations." CAB Member Joseph Minetti, 1966 CAB ANN. REP. 3.

[19] *See* Pacific Southwest Airlines, Inc., Exemption, CAB Order No. E-23958 (July 15, 1966).

[20] Murphy, *supra* note 7.

[21] Enforcement of certification requirements may impose an "undue burden" on intrastate carriers and has exempted some carriers whose participation in interstate commerce is very limited. *See* Pacific Southwest Airlines, Inc., CAB Order E-25483 (Aug. 2, 1962); Application of Aspen Airways, Inc., CAB Order E-18023 (Feb. 14, 1962).

[22] Atwood, *Interstate Carrier—Competitive Impact—Pacific Southwest Airlines*, 32 J. AIR L. & COM. 607 (1966); Osten, *Hustling PSA Bucks Big Lines With Low Fares and Makes It Pay Off*, 23 AIRLIFT 33-34 (1959).

[23] *Id.*; In PSA one finds the interesting combination of businessmen operating an airline, rather than airline people trying to operate a business. AVIATION WEEK AND SPACE TECHNOLOGY, July 1, 1963, at 360.

[24] Atwood, *supra* note 22, at 609.

duced many people to fly rather than take surface transportation.[25] An over-all decline in fares of 25.4 percent from 1962 to 1965 resulted in a 35.5 percent increase in traffic according to the CAB Staff Research Report.[26] A slight time advantage, an eight percent commission to travel agents, rather than the industry-wide five percent, and faster ticket procedures not available on CAB certified flights have been coupled with a "show-biz" flair to overcome the advantages of government mail revenues and out-of-state passengers enjoyed by the interstate carriers.[27] The vigorous competition by a local carrier with no unprofitable routes to support has proved very lucrative for PSA, and has substantially increased the market size and vitality.

However, success such as that enjoyed by PSA depends to a large extent on the particular geographic and economic factors of its route. The distance between the Los Angeles/Long Beach metropolitan area and the San Francisco/Oakland area is 340 miles. Given reasonably comparable rates, surface transportation is obviously less desirable over this distance, since the air traveler enjoys an eight-hour working day that would be lost in travel time on a surface carrier. Few other states have comparable combinations of high density population centers and sufficient distances within the state to make duplication of the PSA success possible.

If the PSA experiment could be duplicated, Texas possesses promising balances of geographic and economic factors. Recognizing this fact, Air Southwest (ASW) petitioned to serve the three major metropolitan areas of Texas (Dallas/Ft. Worth, Houston and San Antonio) with a commuter-type service.[28] It promised several of the promotional devices similar to the PSA marketing technique, including a larger fee to travel agents, "fast-pack" ticketing with centralized computer reservation service, a $600,000 per year advertising budget, more leg room than the coach sections of competing aircraft on the same market and lower rates. In support of its application, ASW pointed particularly to the large percentage of cancellations or delays of the interstate carriers, allegedly caused by the obligations of long-range interstate flights originating outside the market area.[29] Testimony was presented from a market analyst that the entry of ASW would "stimulate" the market to provide 23 percent more future passengers than would otherwise result. This is in a market that already produces at least 77.3 percent of all the originating traffic in Texas.[30]

By concentrating skillful advertising and management ingenuity in developing this triangle of large Texas cities, ASW hoped to develop the

[25] *Id.* at 613. *See also* Morgan, *West Coast Dogfight*, The Wall Street Journal, 11 Feb. 1966, at 24, col. 1.

[26] This report also recognized that the Los Angeles-San Francisco market had the lowest per mile fare in the United States. 4 CAB STAFF RESEARCH REP., TRAFFIC, FARES, AND COMPETITION: LOS ANGELES-SAN FRANCISCO AIR TRAVEL CORRIDOR (1965).

[27] Atwood, *supra* note 22, at 612-14.

[28] Texas Aeronautics Commission v. Braniff Airways, Inc., 439 S.W.2d 699 (Tex. Civ. App. 1969).

[29] *Id.* at 705.

[30] Rose, *Enplaned Airline Traffic in Texas, 1958 to 1964, with Projections Through 1969*, Bureau of Business Research, University of Texas at Austin, 1967.

same market identity and customer acceptance possessed by PSA. ASW's success would be determined by its ability to persuade the commuter passenger to disregard the pure jet services of the interstate carrier and to fly ASW's Electras at lower fares.[31] Cost would be the major factor in this appeal, since most of the other services proposed by ASW were available from interstate carriers. The frequent scheduling and high percentage of empty seats by the existing carriers would have made competition with the existing carriers difficult. The Texas Court of Civil Appeals determined that the interstate carriers had established a conclusive case of adequacy of service and the lack of a public necessity for the proposed service.[32] Since the showing of public convenience and necessity required of the agency must be based upon facts existing at the time the Commission entered its order, the projections of the future growth of the market did not establish a present need for the service offered by ASW. Nevertheless, other carriers are expected to continue application for local service routes in Texas.[33]

Whenever sufficiently large populations become concentrated within two or more metropolitan areas of a single state, competition between intrastate and CAB regulated carriers is likely to develop. Such competition can result in a disruption of the federal program of balanced, controlled competition and a diversion of revenue calculated to pay the cost of unprofitable services provided by the interstate carriers. The extent of this disruption will depend on the CAB reliance on the revenue produced by these high-profit, inter-city routes. The disruption could be prevented by bringing the local carrier that competes with the interstate carrier under CAB regulation. It appears, however, that this would require con-

[31] The scale below contains a comparison of the fares proposed by ASW and the current (Fall 1969) coach fares of the interstate carriers most directly concerned with this case:

	ASW (Electras)	BRANIFF (all jet)	TEXAS INTERNATIONAL
Dallas/Houston	$14.95	$23.00	$21.00
Dallas/San Antonio	14.95	24.00	21.00
Houston/San Antonio	12.95	21.00	19.00

Military bases in San Antonio create much of the traffic of that market. A comparison of military fares would be:

Dallas/San Antonio	$8.10	$17.00	$16.00
Houston/San Antonio	7.95	15.00	14.00

Only speculation is possible as to whether these prices are actually representative of the differential that would actually exist if AWS were in operation, since the interstate fares represent recent price increases imposed by strong inflationary pressures. Whether ASW would have made similar increases or whether the competitive pressure of ASW would have prevented the interstate carriers from making the increases are highly speculative inquiries. *Source* of these comparative figures are 439 S.W.2d at 703-4; Braniff International System Timetable, effective 26 October 1969; Texas International Domestic and International Timetable, effective 1 September 1969 (general rates); Braniff OAG, effective 1 Nov. 1969; Texas International rates, effective 6 Oct. 1969 (military rates).

[32] Texas Statute requires *de novo* review. Therefore, a full hearing was permitted which involved five weeks before the court and resulted in a statement of facts measuring nearly three thousand pages, 439 S.W.2d at 705, 706. An interesting aspect of this case is that *de novo* review was granted, but, as is common in Texas, only substantial evidence to uphold the commission was sought, not a new determination. For an excellent current discussion of Texas substantial evidence *de novo* review: *See* Reavley, *Substantial Evidence and Insubstantial Review in Texas,* 23 Sw. L.J. 239-56 (May 1969).

[33] *See* a mention of Lone Star Airlines which proposed to fly the Dallas-Houston route in CAVES, *supra* note 15, at 88-89. Rio Airlines has applied for another intrastate route in south Texas in competition with interstate carriers. The harmful effects to the interstate carriers are not expected to be substantial. *Corpus Christi Caller,* 14B, June 8, 1969.

gressional approval. Since several economic factors are necessarily involved in each situation, a general solution to the problem remains largely conjectural at present. It appears that either expansion of CAB regulation or a change in the CAB scheme of offsetting the cost of unprofitable services from intrastate inter-city routes will be necessary to allow equal competition of interstate and local carriers.

Gene Raymond Beaty

RECENT DECISIONS

Corporate Law — Merger — Short-Swing Profits

On 5 April 1967 Central Airlines (hereinafter Central) and Frontier Airlines (hereinafter Frontier) agreed in principle to a merger with Frontier to be the surviving corporation. No public disclosure of merger plans was made until 5 May. The defendant, RKO General Inc. (hereinafter RKO), was owner of 56 percent of the outstanding stock of Frontier. On 3 or 4 May 1967, RKO contracted to purchase 49 percent of Central's outstanding stock plus $500,000 of convertible debentures, provided the two airlines merged. RKO received the Central stock on 18 September 1967, following CAB approval of the merger. The securities of Central and Frontier were exchanged 1 October 1967, and RKO received Frontier securities for its Central stock, thus maintaining its control of Frontier. Plaintiff, a stockholder of Frontier, sued in behalf of that airline for the short-swing profits which RKO allegedly realized as a result of the securities exchange. *Held*: The stock transfer constitutes a "sale" of over ten percent of the total outstanding Central stock which had been purchased by RKO within a period of less than six months; RKO, therefore, is liable to Frontier, under section 16(b) of the Securities Exchange Act of 1934,[1] for the profits realized by it from the transaction. *Newmark v. RKO General Inc.*, 294 Supp. 358 (S.D.N.Y. 1968).

The defendant's chief argument was that the exchange of Central stock for the stock of the merged corporation did not constitute a "sale" within the meaning of section 16(b). The court, however, applied the "pragmatic" test of *Blau v. Lamb*,[2] and the similar reasoning of other circuits,[3] by which a "sale" is found, if the transaction in any way makes possible the unfair use of inside information by a principal stockholder. It was found that RKO was the "beneficial owner" of the Central stock on 3 or 4 May, when it contracted to purchase the securities. The fact that RKO had inside information and could have used it seemed obvious to the court. The court also found itself unable to accept RKO's claim that the two stocks were economic equivalents and, therefore, did not present any opportunity for insider abuse. The securities cannot be considered economic equivalents if the issuers are substantially different companies, declared the district court.

The court also found no conflict between section 16(b) of the Securi-

[1] Securities Exchange Act of 1934, § 16(b), 48 Stat. 896 (1934), *as amended*, 15 U.S.C. § 78 (1964).

[2] 363 F.2d 507 (2d Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967).

[3] Petteys v. Butler, 367 F.2d 528 (8th Cir. 1966), *cert. denied*, 385 U.S. 1006 (1967); Booth v. Varian Associates, 334 F.2d (1 Cir. 1964), *cert. denied*, 379 U.S. 961 (1965).

ties Exchange Act of 1934 and section 414 of the Federal Aviation Act,[4] which grants immunity from laws prohibiting the performance of something authorized by certain sections of that Act or a CAB order. Section 16(b), it was found, does not forbid short-swing securities transactions but only provides that the issuing corporation can recover the profits. RKO, then, was not restricted from performing the CAB order and could legally complete the merger despite the provisions of section 16(b).

T.J.V.

Airport Terminal Concession — Arbitration — New Facilities

Plaintiff, the county airport authority, leased space in its terminal to defendant, a restaurant operator, in 1952. The lease provided, in pertinent part, for a renewal option with the rental price to be agreed upon, a compulsory arbitration clause and a specific description of the area leased. The original lease, with the exception of the renewal clause and the rental price, was renewed in 1962. While the authority was actively engaged in planning a new terminal facility, the defendant notified the authority that any restaurant facility in the new terminal could only be operated pursuant to the existing lease. The authority sought a declaratory judgment defining its rights and duties under the lease. Defendant's motion to stay the cause and compel arbitration was denied and judgment was awarded the authority. Defendant perfected this appeal. *Held, reversed and remanded*: The dispute must be submitted to arbitration, but jurisdiction is retained to consider questions raised by the suit which are outside the agreement of the parties. *Bartke's Inc. v. Hillsborough County Aviation Authority*, 217 So.2d 855 (Fla. Dist. Ct. App. 1969).

The Florida Arbitration Code, which allows parties to agree to compulsory arbitration of future disputes, was enacted in 1957.[1] The authority argued that since the arbitration code was not in effect in 1952 when the original lease was signed, the 1962 agreement merely renewed an unenforceable term. The court pointed out, however, that the arbitration code was in effect in 1962 when the renewal was signed and that the 1962 renewal was in fact a new agreement, since the major term—amount of rent—was left open for agreement. Thus the arbitration clause was enforceable. Yet, while enforcing the arbitration clause, the court said that "rights in property clearly not covered by the lease could not be created by arbitration."[2] In effect, then, although the court did not decide the merits, it gave a strong indication of the ultimate outcome.

S.W.S.

[4] Federal Aviation Act of 1958, § 414, 72 Stat. 770 (1958), *as amended*, 49 U.S.C. § 1384 (1964).

[1] FLORIDA ARBITRATION CODE 682.02 (1957).
[2] 217 So. 2d 885 (Fla. Dist. Ct. App. 1969).

Conflict of Laws — Leave To Amend — Prejudicial Delay

Plaintiff, an airline passenger, was injured when, during severe turbulence, his seat belt was torn loose causing him to be thrown against the ceiling of the plane. Plaintiff brought three actions against Delta Airlines (hereinafter Delta), and/or Douglas Aircraft (hereinafter Douglas) at various times, and in different courts, alleging a defect in the seat belt assembly. The first action was brought in the Eastern District of Pennsylvania against both Delta and Douglas. While Douglas' motion to dismiss based on non-amenability of service was pending, plaintiff brought another action in Delaware, which was dismissed because of a one-year statute of limitations. The final action, brought against Douglas alone in the Southern District of New York, alleged negligence and breach of implied warranty. Four years later, Douglas sought leave to amend its original petition to present the defense of California's one year statute of limitation in actions based on implied warranty.[1] The amendment was allowed and the trial on the issue of negligence resulted in a verdict for Douglas. *Held, reversed*: Allowing the amendment is an abuse of the trial court's discretion because after such a lapse of time it will cause substantial prejudice to the plaintiff. *Strauss v. Douglas Aircraft Co.*, 404 F.2d 1152 (2d Cir. 1968).

The court reasoned that, although Federal Rule 15(a)[2] requires that leave to amend the pleadings be granted freely when justice so requires, such amendment should be denied where it might cause substantial prejudice to a party to the action. The court stated that had Douglas raised the statute of limitations in its original answer, the plaintiff could have taken certain protective measures to avoid dismissal, such as renewing the action in another appropriate jurisdiction where it would not be time-barred. Since Douglas was apprised by the plaintiff's pleading that the implied warranty would be an issue in the suit, it should have raised the defense of the statute of limitations in its original answer or made an appropriate amendment within a reasonable time.

The court further stated that the mere fact that a defendant does not believe he will prevail on a limitations question does not excuse delay in raising the defense. Douglas argued that the decision in *George v. Douglas Aircraft Co.*,[3] which allowed the application of California's one year statute of limitations in an implied warranty action brought in New York, was its first notice that such a defense would be successful. But the *George* suit was instituted by Douglas less than one year after Douglas filed its answer in the instant case. At the very least, the court reasoned, Douglas should have amended its answer when it raised the same issue in *George*. Also, Douglas delayed an additional year and a half after the decision in *George* before amending its answer in the instant case.

Leave to amend freely given is still the intent of Rule 15(a), but liti-

[1] The aircraft in question was manufactured by Douglas in California and delivered to Delta there.

[2] FED. R. CIV. P. 15(a).

[3] 332 F.2d 73 (2d Cir.), *cert. denied*, 379 U.S. 904 (1964).

gants must not be allowed to do immeasurable harm to others by simply relying on the liberal language inherent in the rule. The court stated that Douglas' dilatory tactics, causing the plaintiff such immeasurable harm as to result in substantial prejudice, could not be allowed.[4]

R.I.K.

Aerial Spraying — Damages — Notice of Loss

Plaintiff brought an action against Midstate Aerial Applicators Corp. (hereinafter Midstate), applicator of the chemical spray, and against Agsco Chemicals, Inc. (hereinafter Agsco), Midstate's supplier for damages to his crops caused by aerial spraying. Plaintiff had employed Midstate to spray his crops to kill broad leaf weeds. Midstate and Agsco moved for summary judgment and dismissal of the complaint. Defendants alleged as grounds for summary judgment that the complaint did not state a claim since the plaintiff had not complied with two statutory conditions precedent to bringing the action.[1] Motion for summary judgment and dismissal was granted for Agsco but not for Midstate, the applicator,[2] and the plaintiff appealed. *Held, reversed*: The statutory requirements of a verified report of loss and proof of service as conditions precedent to bringing an action for damages for loss of crops or property due to aerial spraying are not applicable to the person for whom the aerial spraying is done. *Don L. Christensen v. Midstate Aerial Applicators Corp., and Agsco Chemicals, Inc.*, 166 N.W.2d 386 (N.D. 1969).

The main question before the North Dakota Supreme Court concerned a matter of statutory construction. The issue was whether the party for whom the aerial crop spraying was done was classified as a "claimant" as termed in the statute. If classified as a "claimant," he would be squarely within the statute and subject to the conditions precedent to bringing the action for damages.[3] The majority held that the plaintiff in this case was not subject to the statutory requirements as conditions precedent to bringing the action since he was found not to be the type of "claimant"

[4] The Court of Appeals also ruled on certain questions of evidence to be permitted at retrial.

[1] "No civil action shall be commenced arising out of the use or application of any herbicide, insecticide, fungicide or agricultural chemical by aircraft, unless the claimant has filed a verified report of the loss with the State of North Dakota Aeronautics Commission, together with proof of service of such verified report of loss upon the operator or applicator allegedly responsible and the person for whom such work was done within a period of sixty days from the occurrence of such loss or within sixty days from the date the claimant knew such loss had occurred, provided, however, if the damage is alleged to have been occasioned to growing crops, the report shall be filed prior to the time when fifty per cent of the crop was harvested." NORTH DAKOTA CENTURY CODE § 28-01-40 (1960). "The verified report of the loss as set forth in Section 28-01-40 shall include, so far as known to the claimant the following: name and address of claimant, type, kind, and location of property allegedly injured or damaged, date the alleged injury or damage occurred, name of operator or applicator allegedly responsible for such loss or damage, and the name of the owner or occupant of the property for whom such operator or applicator was rendering labor or services." NORTH DAKOTA CENTURY CODE § 28-01-41 (1960).

[2] Midstate also moved for summary judgment or dismissal, but the motion was denied. No appeal was taken since the order was not considered appealable.

[3] *Supra* note 1.

for which the statute was intended. The court construed "claimant" to mean a party, other than the one with whom the sprayer had contracted, who alleges damages against the aerial sprayer. Since the statutes stated that the "claimant" must give a verified report of loss and proof of service to both the applicator "and"[4] to the person for whom the work was done, the court reasoned the legislature surely did not intend to require a "claimant" to notify and verify the loss to himself.

Relying on a "plain meaning rule,"[5] the dissent reasoned that the plaintiff was brought within the application of the statute and was subject to the conditions precedent to bringing the action. The dissent also heartily felt this type of arbitrary classification might generate the following constitutional issues: (1) Whether the interpretation given to the statute creates an unreasonable classification of "claimants;" and (2) whether the time within which a "claimant" must file his report is unreasonable.

As the interpretation now stands, however, even though a "claimant" may easily be the person for whom the work was done, such person is not subject to the conditions precedent for bringing action for damages due to aerial spraying as other claimants who are just mere neighbors or other parties.

S.I.G.

Air Carriers — Footlocker Inspection — Constitutionality

Defendant deposited a footlocker with United Air Lines for shipment. Airline employees became suspicious of the contents because of the excessive weight of the locker, and thereupon opened it pursuant to a right reserved in the contract of carriage permitting the airline to inspect to detect possible tariff violations. The search revealed a shipment of marijuana in violation of the Narcotics Drugs Import and Export Act.[1] At the trial, defendant's motion to suppress all evidence obtained by the alleged governmental search was denied. Upon conviction, defendant appealed to the United States Court of Appeals for the Ninth Circuit, his sole contention being that the district court erred in denying the motion. *Held, affirmed*: An independent search by a private carrier for its own purpose does not constitute a governmental search, and, therefore, is not within the protective reach of the Fourth Amendment. *United States v. Spencer*, — F.2d —, 10 Av. Cas. 18,395 (9th Cir. 1969).

The primary issue before the Ninth Circuit was the determination of whether the search was governmental or private in nature. If governmental, the search would be subject to the limitations of the Fourth Amendment. In citing *Corngold v. United States*,[2] the Ninth Circuit re-

[4] *Id.*
[5] Berg v. Torgerson, 100 N.W.2d 153 (N.D. 1969).

[1] Narcotic Drugs Import and Export Act, 70 Stat. 570, 21 U.S.C. § 176a (1964).
[2] 367 F.2d 1, 5 (9th Cir. 1966).

solved this question by stating that the search was governmental if federal or state officers were involved in either its instigation or conduct. In the instant case there were no governmental officials present during the search; therefore, the government could not have been involved, in a formal way, in the inspection. In determining the question of instigation, the Ninth Circuit considered the fact that a Los Angeles police bulletin contributed to the suspicion surrounding the footlocker. However, since the airline officials had a separate private reason to suspect possible tariff violations, the search was held to be independent of government instigation. In *Gold v. United States*,[3] a second case relied on by the court, a search conducted by airline officials based solely on information supplied by federal officers was ruled discretionary and, therefore, non-governmental inasmuch as the officers did not request the search nor were they present when the search was conducted. In the instant case there was no request in the police bulletin to search nor was the bulletin the sole basis of the search. In view of these facts, which are even less compelling than those of the *Gold* case, the holding of the Ninth Circuit in *Spencer* is hardly surprising.

H.J.C.

[3] 378 F.2d 588, 591 (9th Cir. 1967).